Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

SEACOR MARINE LLC,

Petitioner,

v.

GRAND ISLE SHIPYARD, INC. AND
GRAY INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether application of state law to a maritime indemnity action arising out of a personal injury on a vessel in navigation on the high seas contravenes this Court's holding in *Offshore Logistics, Inc. v. Tallentire* that in the Outer Continental Shelf Lands Act Congress intended the location of an accident, not the status of the injured worker, to determine whether state or maritime law applies.

2. Whether application of state law to defeat an otherwise enforceable maritime indemnity claim conflicts with the Constitutional requirement of uniformity in the general maritime law.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The caption of this matter contains the name of all parties to the proceeding. Seacor Marine LLC is wholly owned by Seacor Holdings, Inc., a publicly traded corporation.

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CITATIONS OF OPINIONS BELOW

The district court opinion is reported at *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, No. 06-1405, 2007 WL 2874808 (E.D. La. Sept. 26, 2007). The panel decision of the United States Court of Appeals for the Fifth Circuit reversing the district court was filed September 22, 2008 and is reported at 543 F.3d 256 (5th Cir. 2008). The Fifth Circuit granted rehearing *en banc* and affirmed the ruling of the district court by its ruling dated December 8, 2009 and revised December 10, 2009. The *en banc* decision is reported at 589 F.3d 778 (5th Cir. 2009).

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Title 43. Public Lands

Chapter 29. Submerged Lands

Subchapter III. Outer Continental Shelf Lands

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . .

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, ...

STATEMENT OF THE CASE

Summary

This appeal presents issues of profound importance to all facets of the maritime and offshore oil and gas industries. It is not merely an isolated contractual dispute between the parties to this case, but has far-reaching implications for the interpretation of an important federal statute and for overarching issues of uniformity in the maritime law.

After more than twenty five years of admitted confusion in its decisions interpreting the state law incorporation clause of the Outer Continental Shelf Lands Act[1], the Fifth Circuit granted rehearing en banc in this case for the avowed purpose of resolving "at least some of the conflict among our cases."[2] The result is a

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[1] 43 U.S.C. §§ 1331-1356 (West 2009) ("OCSLA")

[2] Legal commentators have joined in this criticism. *See, e.g.* David W. Robertson, *The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes*, 38 J. Mar. L. & Com. 487, 489 (2007) ("infamously chaotic"); Donald T. Karmer, Annotation, *Construction and Application of § 4 of Outer Continental Shelf Lands Act of 1953 (43 U.S.C.A. § 1333), Relating to Laws Applicable to Subsoil and Seabed of Outer Continental Shelf and Artificial Islands and Fixed Structures Erected Thereon*, 163 A.L.R. 163 A.L.R. Fed. 1, 33 (2000) ("chaos"); Kenneth G. Engerrand, *Primer of Remedies on the Outer Continental Shelf*, 4 Loy. Mar. 19 L.J. 19, 20 (2005) ("bewildering" "inconsistent" "perplexing"); Julia M. Adams & Karen K. Milhollin, *Indemnity on the Outer Continental Shelf—A Practical Primer*, 27 Tul. Mar. L.J. 43, 45 (2002) ("chaos"); (Cont'd)

contrived test that greatly expands the scope of OCSLA far beyond what Congress intended and the statute allows, conflicts with the decision of this Court in *Offshore Logistics, Inc. v. Tallentire*[3] and inevitably will destroy the uniform application of fundamentally important rules of maritime law pertaining to contractual indemnity obligations.

Tallentire held that federal maritime law, not the law of an oil platform state, governed when an oil platform worker was injured not on the platform but on the high seas. The Court said the location of the accident on the high seas required the application of federal maritime law, and rejected the Fifth Circuit's ruling that the worker's job status as a platform worker was determinative and required application of the law of the platform state. In reversing the Fifth Circuit in *Tallentire*, this Court construed OCSLA to confine the application of state law to accidents that took place on the platform or on other Outer Continental Shelf ("OCS") situses enumerated in the statute.[4]

(Cont'd)

Diogenis C. Panagiotis, *Offshore Update—Five Years After Passage: Contractual Indemnity, Defense and Insurance Under the Louisiana Oilfield Indemnity Act,* 10 Mar. Law. 203, 204 (1985) ("various interpretations"); Vincent J. Foley, Note, *Defining "Operation" for Jurisdiction Pursuant to the Outer Continental Shelf Lands Act:* EP Operating Ltd. Partnership v. Placid Oil Co., 19 Tul. Mar. L.J. 165, 167 (1994) ("disagreement among courts").

[3] *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

[4] The author of the (reversed) Fifth Circuit opinion in *Tallentire* also wrote the en banc opinion in this case.

In this case, the accident took place on the high seas, and it is undisputed that federal maritime law governs the ship owner's liability to the injured platform worker. Nevertheless, the Fifth Circuit refused to use *Tallentire's* "location of the accident" test on the ground that the issue was not the shipowner's liability but rather the shipowner's right to shift that liability to the injured worker's employer pursuant to contracts in which each indemnified the other for injuries to their respective employees. Charting the same course it had adopted — and this Court rejected — in *Tallentire*, the Fifth Circuit said that if the contract of the injured worker's employer called for a "majority" of his work to be done on platforms, i.e. that he was properly classified as a "platform worker," then the law of the platform state applied regardless of the fact the injury occurred on a vessel in navigation.

Employing the law of that state, Louisiana, the Fifth Circuit invalidated the indemnity agreement even though the agreement would have been enforced if federal maritime law had been applied. Ironically, under the Fifth Circuit's test, if the situation were reversed, the ship owner would still have to indemnify the platform owner if a seaman were injured on a platform because the majority of a seaman's work is done aboard ship and federal maritime law would enforce the ship owner's contractual indemnity obligation.

Applying the test created by the Fifth Circuit in this case will inevitably result in inconsistent results in other maritime cases when injuries happen on board vessels to workers that are assigned to platforms in other States whose law is different from the state law applied here.

This is important because this case is not an isolated dispute of interest only to the parties to the litigation. If nothing else, the sheer volume of OCSLA indemnity cases arising out of Louisiana and Texas shows that the issues involved in this appeal are of profound interest to all facets of the maritime and offshore oil and gas industries. Further, the widespread critical attention these cases have received in the professional and academic literature shows that the question of how to interpret this important federal statute remains unsettled, despite the efforts of the lower courts. The conflicting results this uncertainty inevitably produces will only increase as offshore oil and gas exploration expands into other states, making it all the more important that this Court establish a bright line rule of uniform statutory construction.

Petitioner respectfully submits, therefore, that this Court should exercise its discretion to issue the writ of certiorari in order to correct the Fifth Circuit's circumvention of *Tallentire* and to establish a uniform maritime rule that is consistent with this Court's prior decisions and the express language of the OCSLA.

While petitioner recognizes that a conflict among the circuits is an important factor in the decision whether to grant certiorari, the simple fact of where oil platforms are primarily located currently — the Gulf of Mexico offshore Louisiana and Texas — explains why no other circuit has yet considered these important questions of statutory construction. It is inevitable that when they do, though, different outcomes will result since different state law will be applied.

Proceedings Below

This maritime contractual indemnity dispute arises out of a personal injury claim by Denny Neil, an offshore employee of respondent Grand Isle Shipyard, Inc. ("Grand Isle"). Neil slipped and fell on the deck of the offshore service vessel SEA HORSE IV on April 28, 2005, while he was being transported to work on an Outer Continental Shelf fixed platform located approximately 11 miles offshore. Petitioner Seacor Marine, L.L.C. ("Seacor"), is the owner of the SEA HORSE IV.

At the time of Neil's injury on the vessel, the SEA HORSE IV was operating outside Louisiana in the navigable waters of the Gulf of Mexico above the OCS. That is to say that the injury which spawned this indemnity dispute arose on a vessel navigating on the high seas and which was not at the time physically connected either to the OCS or to any facility erected on it.

Neil sued Seacor in the United States District Court for the Southern District of Texas. He asserted a maritime claim for vessel negligence under § 905(b) of the Longshore and Harbor Workers Compensation Act. That vessel negligence claim was settled in due course by Seacor and is not at issue in this case.

Upon the filing of suit by Neil, Seacor tendered its defense and indemnity to Grand Isle on the basis of contracts described below. Seacor also claimed from respondent Gray Insurance Company ("Gray") the benefit of the first party liability insurance coverage that

Grand Isle was contractually required to provide to Seacor. Seacor's tender and its separate claim for insurance coverage were denied.

Asserting diversity jurisdiction, Grand Isle and Gray then filed a declaratory judgment action in the United States District Court for the Eastern District of Louisiana. They sought a determination that the relevant provisions of the indemnity contracts were unenforceable by virtue of the Louisiana Oilfield Indemnity Act[5], which respondents claimed was applicable by virtue of the so-called state law incorporation clause of the OCSLA.[6]

Cross motions for summary judgment were filed on the limited question of whether state law applied to an indemnity obligation arising from an injury on a vessel on the high seas when the injured party was an OCSLA worker. The district court granted respondent's motion, finding that Louisiana law applied notwithstanding that the underlying accident giving rise to the claim occurred on a vessel and without discussion of this Court's holding in *Tallentire*, which held that Congress intended OCSLA's application to be principally dependent on the location of the accident rather than the status of the person claiming injury.

Relying in substantial part on *Tallentire*, a panel of the Fifth Circuit unanimously reversed, holding that Louisiana law did not apply via OCSLA and that the

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[5] La. Rev. Stat. Ann. § 9:2780 (1995).

[6] 43 U.S.C.A. § 1333 (West 2009).

indemnity was enforceable as a matter of federal, maritime law.

A petition for rehearing en banc was granted. With four judges dissenting, a majority of the court affirmed the district court decision in favor of respondents. The court concluded, without citation of authority, that *Tallentire* was distinguishable because it was a tort as opposed to a contract case, and then created and employed an entirely new "focus-of-the-contract test" to determine the scope of application of OCSLA.

The Contracts

The indemnity and insurance obligations on which petitioner's claims are based are found in two separate BP American Production Company ("BP) contracts that were drafted to be read *in pari materia* and to create reciprocal third party beneficiary obligations by and between Seacor and Grand Isle. If enforced, they make each party financially responsible for injury claims brought by their own employees, irrespective of fault.[7]

First, in October 2003, respondent Grand Isle and BP executed a Master Maintenance and Construction Services Contract (the "MMCSC") pursuant to which Grand Isle provided labor and construction related services to BP's fixed offshore platforms. Second, in January, 2004, BP and petitioner Seacor entered into a Vessel Charter Contract (the "Charter") pursuant to

[7] In the offshore industry, where such provisions are very common, these mutual indemnity obligations are referred to as "knock for knock" agreements.

which Seacor supplied vessels and crew to BP in service of BP's offshore activities. The mission of the SEA HORSE IV, the vessel which Seacor utilized to perform its contractual obligation to BP, was to provide marine transportation to BP and its subcontractors, including Grand Isle. This Charter is therefore a maritime contract.[8]

Both contracts contain choice of law provisions calling for application of the general maritime law, which allows indemnity.[9] It is not disputed that the contracts contain reciprocal indemnity provisions which would require Grand Isle to indemnify Seacor for the costs incurred in settling Neil's claim unless indemnity is prohibited by Louisiana state law. Additionally, both contracts contain virtually identical provisions with respect to the rights of third parties:

> It is the intent of the Parties herein to create a third party beneficiary obligation in favor of [BP's] other contractors who have included reciprocal cross indemnity provisions in their respective contracts with [BP].

Consequently, the two contracts must be viewed as a single, unified maritime contract just as were the

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[8] *See, e.g., The GOTHLAND*, 64 U.S. 491, 492 (1859).

[9] *See* Section 24.01 of the MMCSC and Section 28.01 of the Charter. *See also Angelina Cas. Co. v. Exxon Corp., U.S.A., Inc.*, 876 F.2d 40, 42 (5th Cir. 1989); *Lefler v. Atlantic Richfield Co.*, 785 F.2d 1341, 1343 (5th Cir. 1986).

intermodal contracts in *Norfolk Southern Railway Company v. Kirby*.[10]

ARGUMENT AND REASONS FOR GRANTING THE PETITION

1. **Whether application of state law to a maritime indemnity action arising out of a personal injury on a vessel in navigation on the high seas contravenes this Court's holding in *Offshore Logistics, Inc. v. Tallentire* that in the Outer Continental Shelf Lands Act Congress intended the location of an accident, not the status of the injured worker, to determine whether state or maritime law applies.**

Because Denny Neil's accident occurred beyond Louisiana territorial waters, Louisiana law can be applicable to disputes arising out of his claim only if state law is applicable as surrogate federal law under the state law incorporation clause of OCSLA.[11]

The Fifth Circuit's holding that state law applied as surrogate federal law is contrary to the plain wording of the statute, which has two essential components for the purposes of this analysis. First, § 1333(a)(1) contains

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[10] *Norfolk S. Ry. v. Kirby*, 543 U.S. 14, 29 (2004). ("Confusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning.")

[11] State territorial waters extend three geographical miles from the coastline of Louisiana. This accident happened approximately 11 miles offshore.

the general Congressional assertion of federal sovereignty over the OCS and to all artificial islands and installations permanently or temporarily attached to the seabed for the purpose of developing offshore resources, "other than a ship or vessel". Second, § 1333(a)(2)(A), the state law incorporation clause, adopts state law as surrogate federal law but only for clearly defined geographic areas, being ". . . that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon. . ."

Insofar as this case turns on interpretation of these sections of OCSLA, it is remarkable that the Fifth Circuit made no effort to analyze the statutory language. In fact, the court mentions the statute only to quote it, actually just part of it. The court did not discuss or even cite the general jurisdictional provision contained in Section (a)(1) in which federal authority is asserted over offshore locations ". . . other than a ship or vessel. . ." The underlying incident giving rise to this maritime dispute happened on a vessel which at the time was operating on the high seas. That should be the end of the matter since OCSLA, by its very terms, does not apply to vessels. If OCSLA does not apply, then the statute's state law incorporation clause does not come into play and Louisiana state law cannot be made applicable as surrogate federal law.

Even if it were found that the circumscribed geographic exercise of federal sovereignty found in Section (a)(1) had been met, the result is the same — state law still does not apply. This is because the state law incorporation clause of the statute, Section (2)(A), adopts state law as federal law only for limited

geographic areas on the OCS, one of which is not a vessel such as the petitioner's SEA HORSE IV while navigating on the high seas. Rather, state law is incorporated *only* for the subsoil and seabed of the OCS and artificial islands and fixed structures erected thereon. The SEA HORSE IV obviously is not within that limited geographic scope in which, and only in which, state law is incorporated.

Rather than apply the clear language of the statute, though, the Fifth Circuit read into OCSLA what it labeled a "focus-of-the-contract test" pursuant to which lower courts must ascertain in what location, an OCS situs or not, a majority of the contract work is to be done. If the contract calls for a majority of work to be done on, for example, a fixed offshore platform, then state law applies to the resolution of all issues arising under that contract, even those that, like Denny Neil's accident here, are purely maritime in nature. In other words, if employees supplied pursuant to a given contract are platform, i.e. OCS, workers, then the new Fifth Circuit test would result in application of state law to any and all contractual disputes arising from injuries they sustain, including those that are inherently maritime in nature.

This Court reversed a similar finding, also by the Fifth Circuit, in *Tallentire*, in which the Court considered whether the Death on the High Seas Act ("DOHSA")[12] provided the exclusive remedy for the survivors of two offshore platform workers killed when the helicopter that was carrying them to an offshore

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[12] 46 U.S.C.A. §§ 30301-30306 (West 2009).

platform crashed into the high seas. The survivors of the decedents argued that damages recoverable under DOHSA, a federal remedy, could be supplemented by Louisiana law, applying either of its own force or as surrogate federal law under OCSLA. As in this case, the incident giving rise to the dispute involved an offshore platform worker being ferried to work on a fixed offshore structure on the OCS. Also as in this case, the accident happened outside Louisiana's three mile territorial limit.

The Fifth Circuit held that Louisiana law applied. Because, at least in part, the Fifth Circuit's decision created ". . . the potential for disunity in the administration of wrongful death remedies for causes of action arising from accidents on the high seas. . .", certiorari was granted.[13] This Court reversed, noting that OCSLA controls, ". . . only on 'the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures' erected thereon."[14]

The plaintiffs in *Tallentire* argued, and the Fifth Circuit agreed, that the decedents' status as platform workers controlled and rendered OCSLA applicable. This Court rejected that argument, noting that, "we cannot accept respondents' attempt to rewrite

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[13] Because the Fifth Circuit decision in this case creates not only the "potential for disunity" but the certainty of it, petitioner submits that certiorari should also be granted in this case. This issue is discussed in more detail below.

[14] *Tallentire*, 477 U.S. at 217.

OCSLA."[15] Rewriting the statute is precisely what the Fifth Circuit has done here.

Relying on the statutory language, as the Fifth Circuit should have done in this case, this Court went on to hold in *Tallentire*:

> We do not interpret § 4 of OCSLA, 43 U.S.C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed.[16]

Ultimately, after also noting the importance of uniformity in admiralty law, this Court concluded that Louisiana state law did not apply as surrogate federal law.[17]

In this case, the Fifth Circuit sidestepped *Tallentire* by noting simply that it was a tort case and that the present dispute sounds in contract. The court wrote:

> Once we recognize that the claim for indemnity is a claim based in contract rather

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[15] *Tallentire*, 477 U.S at 218.

[16] *Id.* at 219.

[17] *Id.* at 221.

> than in tort, we see no reason to apply tort analysis to determine where the contractual controversy arose. *It makes more sense* to apply a focus-of-the-contract test and say that a contractual dispute — the "controversy" under the first condition of the *PLT* test — arises under an OCSLA situs if a majority of the work called for by the contract is on stationary platforms or other enumerated OCSLA situses.[18]

The Fifth Circuit cites no authority for this tort/contract distinction which certainly has no basis whatever in the statute. The court likewise does not explain how OCSLA, which by its specific terms does not apply to a ship or vessel, is nevertheless held applicable to a vessel owner's indemnity claim arising out of an accident on a vessel in navigation on the high seas. There likewise is no attempt by the Fifth Circuit to explain how the requirements of OCSLA's state law incorporation clause are satisfied, and in fact there could not be, since that clause makes clear that state law can be applied only to the subsoil and seabed of the OCS and artificial islands and fixed structures erected on it.[19]

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[18] *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC.*, 589 F.3d 778, 787 (5th Cir. 2009) (italics added). This holding creates the anomalous situation in which the injured party's claim against the boat owner is controlled by maritime law, but the boat owner's resulting contractual indemnity claim against the injured party's employer is controlled by state law.

[19] *See Tallentire*, 477 U.S. at 217.

It is not for a court to rewrite a statute by, in this case, contriving a "focus-of-the-contract" test and making a distinction between torts and contracts when none exists in the statute, simply because the court believes that to do so would "make more sense".

The Court should grant certiorari to correct the Fifth Circuit's substitution of its own view of what "makes more sense" for that of Congress.

2. Whether application of state law to defeat an otherwise enforceable maritime indemnity claim conflicts with the Constitutional requirement of uniformity in the general maritime law.

The maritime jurisprudence of this Court has long recognized the need for a uniform body of maritime law since ships are inherently mobile and, in the absence of uniformity, would be subject to the different laws and regulations of any state in which they called, severely hindering maritime commerce.[20]

Denny Neil was injured on a vessel which was at the time operating on the high seas adjacent to but beyond the territorial limits of Louisiana. The platform to which he was destined was also located on the OCS adjacent to Louisiana. The Fifth Circuit applied Louisiana state law to the indemnity claim that arose out of Neil's accident once the court concluded that OCSLA applied.

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[20] *See, e.g. Kirby*, 543 U.S. at 28.

Had Neil's maritime, ship-board accident occurred at a time when a majority of his work was being performed on a platform located offshore of Mississippi or Alabama or some other state, then under the new "focus-of-the-contract test" of the Fifth Circuit, the law of that state would apply. In any state which does not have an anti-indemnity statute, Seacor's claim for contractual indemnity and insurance coverage arising out this quite typical maritime accident would have prevailed.

This is a clear illustration of how the decision of the Fifth Circuit will inevitably produce conflicting results in maritime indemnity cases and thus is contrary to the well-established Constitutional requirement that there be a uniform body of maritime law applicable to maritime contracts and disputes. As this Court wrote in *Norfolk Southern Railway Company v. Kirby* when it recently addressed the uniformity issue in the maritime context:

> . . . our touchstone is a concern for the uniform meaning of maritime contracts like the . . . bills [of lading involved in this case]. We have explained that Article III's grant of admiralty jurisdiction " ' must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial

> character affecting he intercourse of the States with each other or with foreign states.'"[21]

Kirby is particularly instructive since it involved a contract with both maritime and non-maritime components (ocean carriage and inland rail transportation) just as the BP contracts here, which must be read as one contract given the express third party beneficiary language contained in each, involve maritime (ocean transportation of Grand Isle employees) and non-maritime (offshore platform labor) components. Because "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning", the Court in *Kirby* applied maritime law to the entire contract, including the non-maritime function of transporting the cargo by train to its ultimate destination.

The only way the important goal of uniformity can be fostered in this case is to apply a single, unified body of law — the general maritime law — to the entire controversy. The decision of the Fifth Circuit does just the opposite. It will unavoidably result in the random application of maritime or state law which, as in this case, produce completely different results.

As a practical matter as well, the Fifth Circuit test will be impossible to apply uniformly. As in this case, for example, the injured plaintiff's claim against the vessel owner is governed by maritime law but the owner's indemnity claim against the worker's employer is not,

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[21] *Kirby*, 543 U.S. at 28 (citations omitted).

unless the worker is assigned to work on platforms in or adjacent to a state that doesn't prohibit indemnity.

Similarly, if a platform worker is being ferried by a vessel to work and is injured in the same accident on the same vessel that also injures a non-platform worker, then state law applies to the vessel owner's indemnity claim against the employer of the platform worker and maritime law applies to the vessel owner's indemnity claim against the non-platform worker's employer.

Even indemnity claims arising from injury to two platform workers injured on the same vessel in the same incident would be subject to different law if one worker spent the majority of his time on a platform in Louisiana and the other spent the majority of his time on a platform in Mississippi or some other state which doesn't prohibit indemnity.

These anomalies make clear that rather than promoting uniformity, the Fifth Circuit decision guarantees inconsistency and uncertainty. Applying the locality rule of the statute and of *Tallentire*, in contrast, would produce consistent results for all issues emanating out of purely maritime actions, regardless of the "focus-of-the-contract" pursuant to which an injured plaintiff was working or his status, or lack thereof, as a platform worker. In other words, the same maritime law that governs a vessel's liability to its passengers would also govern the ability of the vessel to shift that liability contractually to a third person, regardless of the nature of the contract or the status of the person whose injury prompted the indemnity claim. This is the essence of uniformity.

CONCLUSION

The issues involved in this appeal are important not only to the offshore oil and gas industry, but also to all litigants whose disputes are subject to maritime law and who need to know that their mutual indemnity contracts will be uniformly applied. Under the contrived test created by the Fifth Circuit in this case, interpretation of a maritime indemnity obligation in the OCS context will vary depending on where an injured person has previously spent the majority of his work time. This test compounds twenty five years of confusion in the Fifth Circuit's interpretation of OCSLA, a fact that court has itself repeatedly recognized and the critical commentary has confirmed. Only this Court can reassert the continued viability of *Tallentire*, interpret the statute to mean what it says and get this ship back on course.

Simply put, the contrived test announced in this case to determine the scope of application of OCSLA is essentially a legislative creation of the court of appeals which goes far beyond the clear wording of a bright line federal statute, circumvents the controlling decision of this Court in *Tallentire* and destroys even the possibility of the uniform application of important maritime law indemnity principles. Certiorari should be granted to correct these fundamental errors.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED DECEMBER 8, 2009

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 07-31019

GRAND ISLE SHIPYARD INC;
GRAY INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

SEACOR MARINE, LLC,

Defendant-Appellant.

Before JONES, Chief Judge, KING, JOLLY, DAVIS, WIENER, BARKSDALE, GARZA, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK, and HAYNES, Circuit Judges. EMILIO M. GARZA, Circuit Judge, with whom JENNIFER WALKER ELROD and LESLIE H. SOUTHWICK, Circuit Judges, join, dissenting. PRISCILLA R. OWEN, Circuit Judge, dissenting.

W. EUGENE DAVIS, Circuit Judge:

I.

The question presented by this appeal is what law governs the resolution of a contractual dispute, here enforceability of an indemnity provision, when the act or omission that causes the underlying death, bodily injury, or property damage (hereafter, the "tort") which triggered the contractual indemnity claim occurred on navigable water on the Outer Continental Shelf ("OCS"), but the contract that creates the indemnity obligation between the parties calls for a majority of the work to be performed on stationary platforms on the OCS. Central to this issue is the application of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, *et seq.* ("OCSLA").

The law is clear that when a tort occurs on navigable water on the OCS, as opposed to, for example, a stationary platform, and a non-seaman is injured, maritime law applies to the ensuing tort action by that worker against third parties. Some of our cases have applied this same rule to a contractual indemnity dispute and looked to the site of the tort to determine the situs of the controversy, the first step in deciding what law applies. Instead of looking to the site of the tort, other cases have applied what amounts to a focus-of-the-contract test which looks to where the contract contemplates that most of the work will be performed: if a majority of the performance called for by the contract is on stationary platforms on the OCS, that is the situs of the controversy for purposes of determining whether the law of the adjacent state applies as surrogate federal law. If a majority of the work called for by

the contract is aboard vessels on navigable water on the OCS, this is the situs of the controversy.

We hold that the focus-of-the-contract test is the appropriate test to apply in determining the situs of the controversy in contract cases, and we adopt that rule for the circuit. We therefore agree with the trial judge that because the relevant contract contemplated that a majority of the contractor's work would be performed on stationary platforms on the OCS, this should be deemed the relevant "situs" for the instant indemnity dispute and because none of the other factors lead us to apply any other law, we must apply Louisiana law. When we apply Louisiana law, the Louisiana Oilfield Indemnity Act, LA. REV. STAT. ANN. § 9:2780(A) ("LOIA") renders the indemnity agreement at issue unenforceable, so we affirm the summary judgment in favor of Grand Isle.

II. FACTS

This declaratory judgment action involves an indemnity dispute between Grand Isle and Seacor, two contractors of BP American Production Company ("BP"). Grand Isle's contracting duties involved the repair and maintenance of BP's offshore platforms, while Seacor's duties involved the transporting of workers for BP and its contractors. The indemnity dispute in this case arises from an April 2005 incident in which Denny Neil, a Grand Isle employee, was injured in a fall onboard the M/V SEA HORSE IV, a vessel owned and operated by Seacor. At the time of the accident, the SEA HORSE IV was transporting Neil from his work platform to

the residential platform which contained his living quarters. Deposition testimony indicated that the vessel was in close proximity to the residential platform at the time of the accident, but it is undisputed that neither Neil nor the SEA HORSE IV were in physical contact with the platform when the accident occurred.

Neil filed suit against Seacor in the U.S. District Court for the Southern District of Texas, asserting a claim for vessel negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act ("LHWCA"). Seacor tendered its defense and indemnity to Grand Isle; Seacor also claimed the benefit of insurance provided by Grand Isle's insurer Gray. On March 17, 2006, Grand Isle and Gray filed suit in the U.S. District Court for the Eastern District of Louisiana, seeking a declaratory judgment that: (1) Grand Isle is not contractually obligated to defend and indemnify Seacor; and (2) Seacor is not entitled to insurance coverage from Gray.

Grand Isle and Gray subsequently filed motions for summary judgment in which they argued that by virtue of OCSLA, the LOIA applies as surrogate federal law in this case, thus invalidating the contractual indemnity provision at issue here; and (2) that § 905(b) of the LHWCA is applicable to the case and prohibits enforcement of the indemnity provision. Seacor filed its own cross motion for summary judgment, maintaining that general maritime law governs the dispute and noting that nothing in that law prohibits the indemnity agreement at issue here.

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 543 F.3d 256, 257-58 (5th Cir. 2008) (hereinafter *Grand Isle (Panel)*), *vacated*, 569 F.3d 523 (5th Cir. 2009) (en banc). Seacor seeks indemnity under the contract between Grand Isle and BP. Paragraph 14.07 of that contract[1] is virtually identical to the indemnity agreement in a contract between BP and Seacor, "and neither party disputes that BP sought thereby to impose reciprocal indemnity obligations among its contractors." *Id.* at 258. The undisputed objective was for each contractor whose employee was injured to hold

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[1] Paragraph 14.07 reads:

> Contractor [Grand Isle] agrees to defend, indemnify, release and hold company's other contractors harmless in accordance with the provisions of this Article 14 (to the extent such other Contractors execute cross indemnification provisions substantially similar to those contained in this section 14.07) from and against all claims, liabilities, damages, and expenses (including without limitation attorney's fees and other costs of defense), irrespective of insurance coverages for the following: 14.07.01(I) all injuries to, deaths, or illnesses of persons in Contractor Group: ... whether or not occasioned by or the result in whole or in part of the negligence or fault, whether sole, concurrent, joint, active, or passive, of company's other contractors or any other entity or person or the unseaworthiness of any vessel.

"Contractor Group" is defined in Paragraph 14.01.03 as "the following entities and persons individually and collectively: Contractor [Grand Isle Shipyard, Inc., per the preamble to the contract] and its Affiliates, its subcontractors and their Affiliates, and the officers, directors, employees, agents, and representatives of all of those entities . . . ."

harmless and indemnify BP (and other contractors engaged by BP on the jobsite) for liability resulting from injuries to or death of that employee. The material facts are not in dispute.

The ultimate legal issue before the district court and the panel, and now before the full court, is whether the adjacent state law of Louisiana, including the LOIA, applies to the case. The parties agree that if the LOIA does apply, it invalidates Grand Isle's indemnity obligation to Seacor, but if Louisiana law and the LOIA do not apply, the indemnity agreement is enforceable.

To determine whether OCSLA required application of state law to this dispute, the district court applied the three-part test that the Supreme Court formulated in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969). We have applied that test in a number of cases, including *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990) (hereinafter *PLT*). As we articulated the *Rodrigue* test in *PLT*, for state law to apply as surrogate federal law, three conditions must be met: "(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law." *Id.*

Here, the district court first considered whether the indemnity controversy arose on an OCSLA situs, i.e., on a stationary platform or other

location on the OCS as provided for in OCSLA. In considering this first *PLT* condition, the district court determined that the OCSLA situs requirement was met because (1) the situs of the contract containing the indemnity agreement at issue depends upon the location where performance of the work is called for by the contract, and (2) the contract between Grand Isle and BP contemplated that most of the work was to be performed on BP platforms, i.e., OCSLA covered situses. *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 2007 U.S. Dist. LEXIS 71674, 2007 WL 2874808, at *3 (E.D. La. 2007) (hereinafter *Grand Isle (District)*).[2] The court also found that the second and third *PLT* conditions were met. 2007 U.S. Dist. LEXIS 71674, [WL] at *4-5. Accordingly, the district court granted Grand Isle's and Gray's motion for summary judgment and denied Seacor's motion. 2007 U.S. Dist. LEXIS 71674, [WL] at *6.

Seacor timely appealed, and the panel reversed. The panel concluded that because Neil's accident occurred on a vessel on navigable water above the OCS and not on a situs expressly covered under the OCSLA, this indemnity dispute did not arise on a covered situs; thus, it was unnecessary to

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[2] The district court also relied on a well-reasoned district court opinion, *Wagner v. McDermott, Inc.*, 899 F. Supp. 1551 (W.D. La 1994), *aff'd.* 79 F.3d 20 (5th Cir.), *cert. denied*, 519 U.S. 945, 117 S. Ct. 333, 136 L. Ed. 2d 246 (1996). The district court in Wagner stated: "Thus, under Union Texas, the OCSLA situs factor is met in the instant case, as the work required by the contract was performed on an offshore platform." *Id.* at 1556. The court of appeals affirmed on an alternate ground.

address the second and third prongs of the *PLT* test. *Grand Isle (Panel)*, 543 F.3d at 259-60. The panel therefore concluded that the LOIA could not apply as surrogate federal law to void the indemnity agreement, and it vacated and remanded on that basis. *Id.* at 263-64. We granted Grand Isle's petition for rehearing en banc to address this important question of law.

III. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. "[W]e review de novo the district court's order granting [Grand Isle's and Gray's] motion for summary judgment under Rule 56 and apply the same standard as did the district court." *Cornerstone Christian Schs. v. Univ. Interscholastic League*, 563 F.3d 127, 133 (5th Cir. 2009).

IV. ANALYSIS

As indicated above, the critical question we must answer is what law applies. The answer to this question depends on the applicability of the OCSLA to the uncontradicted facts. More particularly, in *PLT* terms, we must identify the "situs" of the controversy.

In deciding this question we begin with the governing statute, OCSLA, which provides in pertinent part:

> (2)(A) To the extent that they are applicable and not inconsistent with this subchapter

> or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf. . . .

43 U.S.C. § 1333(a)(1), (2)(A).

The Supreme Court in *Rodrigue* stated that "[t]he purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer [sic] Continental Shelf." 395 U.S. at 355. As we noted in *PLT*, "*Rodrigue* made clear that 'for federal law to oust adopted state law, federal law must first apply.'" 895 F.2d at 1047 (quoting *Rodrigue*, 395 U.S. at 359). To determine whether state law applies, the *PLT* court expressed the three-part test stated above.[3] In *PLT*, the court began its analysis by looking to *Rodrigue*, a seminal case interpreting OCSLA.

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[3] "(1) The controversy must arise on a situs covered by OCSLA (i.e., the subsoil seabed, or artificial structure permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with federal law." 895 F.2d at 1047.

Rodrigue was a consolidated case involving two separate wrongful death actions. In one, a crane operator on a stationary platform was killed when the crane collapsed and toppled over. In the other, the decedent was killed when he fell from a derrick above a stationary platform to the floor of the platform. The defendants argued that the Death on the High Seas Act, 46 U.S.C. § 761, et seq. ("DOHSA"), applied; the survivors sought application of the Louisiana Wrongful Death Act. For both cases, the Supreme Court held that because the deaths occurred on stationary platforms on the Outer Continental Shelf--each a covered situs under OCSLA--Louisiana law applied as surrogate federal law through OCSLA. *Rodrigue*, 395 U.S. at 355. Thus, in a tort action, *Rodrigue* illustrates that the OCSLA situs requirement is met if the tort occurs on a platform or other OCSLA covered situs as provided in § 1333(a)(2)(A).

The converse is equally clear. In a tort action, if the tort occurs on navigable water instead of a fixed platform (or other structure attached to the seabed), the OCSLA situs requirement is not met. For example, in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986), a helicopter ferrying platform workers home after they finished their shift on a stationary platform crashed and two offshore workers drowned. The Court was called upon to decide whether DOHSA applied or the Louisiana wrongful death statute applied as surrogate federal law under OCSLA. 477 U.S. at 209. The Court concluded that because the incident occurred more than a marine league from shore, DOHSA applied, stating:

> Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore. See 46 U.S.C. § 761. Even without this statutory provision, admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity.

Id. at 218-19.

In concluding that OCSLA did not call for application of state law when the incident did not occur on an OCSLA situs, the *Tallentire* Court stated:

> The intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures.

Id. at 217 (citing *Rodrigue*, 395 U.S. at 361-66).

Although it is clear that *Rodrigue* and *Tallentire* provide the situs rule for tort cases, it does not follow that contract cases triggered by an underlying tort depend on the situs of that tort, i.e., the location of that occurrence. Notably, *PLT* was a pure contract case to collect unpaid invoices for the

installation of a subsea pipeline and to impose a statutory lien on the pipeline under Louisiana law. 895 F.2d at 1045-46. *PLT* and its subcontractors relied on *Tallentire* (and OCSLA itself) for the proposition that the controversy arose on an OCSLA situs and state lien law applied. *Id.* at 1049-50. Union Texas Petroleum Corp. argued that state law did not apply because

> [A]ll of the subcontractors' contracts for the building and completion of the pipeline called for services which were provided from vessels and by divers in the ocean, not on a platform, and therefore were not in areas covered by OCSLA.

Id. at 1047. Judge Brown, writing for the panel in *PLT*, held, however, that despite the fact that some of the work was performed from vessels, state law did apply.

> In the first place, the gathering line exactly fits the statutory definition of an "other device[] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom." 43 U.S.C. § 1333(a)(1). In addition, the gathering line was buried beneath the ocean floor. It was connected to a platform at one end. It was connected to a transmission line at the other. *The locations where the substantial work was done were covered situses--the subsoil or seabed; an artificial island; and an installation for the production of*

> *resources*. Thus the first condition [situs] is met.

Id. at 1047-48 (footnotes omitted) (emphasis added). To determine situs, the *PLT* panel did not focus on where the underlying incident that gave rise to the contract claim occurred (i.e., the nonpayment of the subcontractors) but looked instead to where the work under the contract was performed.[4]

Later cases ostensibly applying *PLT* to contractual indemnity claims have ignored the situs of the contract and looked instead to the situs of the underlying tort. Those cases essentially hold that the location of the underlying tort determines the "situs of the controversy" without regard to where the majority of the work under the contract was to be performed. For example, in *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662, 663-64 (5th Cir. 1992), a worker was crushed between a boat and a stationary platform and then drowned. His survivors filed a wrongful death action against the platform and vessel owners, and the platform owner in turn filed a third-party demand seeking contractual indemnity. *Id.* at 664. The underlying tort claim settled, leaving only the contractual indemnity claim to be decided on appeal. *Id.* In analyzing the situs element of the *PLT* test, the *Hollier* panel did not consider or discuss the contract's situs--where the work was performed under the contract--but looked

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[4] See Julia M. Adams & Karen K. Mihollin, *Indemnity on the Outer Continental Shelf--A Practical Primer*, 27 TUL. MAR. L. J. 43, 53 (2002).

exclusively to the situs of the underlying incident. *Id.* at 664-65.

Likewise, in *Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 458 (5th Cir. 1992), the underlying incident (an injury on a drilling platform) settled, leaving only a contractual indemnity claim on appeal. As in *Hollier*, the *Smith* panel did not discuss the situs of the contract under the first prong of the *PLT* test; it looked only to the situs of the underlying incident. *Id.* at 459.

Indeed, in neither *Hollier* nor *Smith* did we make an explicit choice between the situs of the contract and the situs of the underlying incident; we simply determined that the situs of the underlying incident controlled without discussion. The confusion is evident in *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1527 (5th Cir. 1996), in which the panel stated: "Assuming without deciding that *Hollier* and *Smith* state a rule in this circuit providing that the situs of the controversy in an OCSLA indemnity clause case is the location of the accident, we agree with the district court and find that the situs requirement is met in this case" because the underlying incident occurred on an OCSLA situs. See also *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 498 (5th Cir. 2002) (finding that OCSLA situs existed for both a tort claim and the related indemnity claim--without distinguishing between the two--because the accident took place on an OCSLA situs); Adams & Milhollin, supra note 4, at 54 (noting *Hollier* and *Hodgen's* failure to look to the contract for situs). Instead of following *PLT* in these contract cases and applying general contract

principles, we applied tort principles and looked to the location of the underlying incident for OCSLA situs.

Our case law, however, requires us to distinguish between a contractual indemnity claim and the underlying incident. For instance, in *Sumrall v. Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002), we explained that in an earlier case, "although the underlying claim creating the obligation for which Shell Oil sought indemnification from Sladco sounded in tort, the obligation for which Shell sought indemnification itself was *contractual* in nature, as it arose from the agreement between Shell and Diamond M." *Id.* at 319 (citing *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329, 333 (5th Cir. 1981)) (emphasis in original).

Here, the district court followed *PLT*, which analyzed the indemnity action as a contract claim rather than as a tort claim. On appeal, however, the panel followed those of our cases that had determined OCSLA situs using tort principles. The opposed positions of the district court and the panel both find support in our case law, which all can agree is conflicting and confusing.[5] We granted en

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[5] See, e.g., David W. Robertson, The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes, 38 J. Mar. L. & Com. 487 (2007); E. Stewart Spielman, Drilling Through the Muddied Waters on the Outer Continental Shelf: An Examination of the Fifth Circuit's Recent Decision in Demette v. Falcon Drilling Co., 26 TUL. MAR. L.J. 683, 694 (2002) ("'In each new case, a panel of this court must comb through a bewildering array of cases that rely upon inconsistent

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banc consideration of this case to clarify this area and to resolve at least some of the conflict among our cases.

Once we recognize that the claim for indemnity is a claim based in contract rather than in tort, we see no reason to apply tort analysis to determine where the contractual controversy arose. It makes more sense to apply a focus-of-the-contract test and say that a contractual dispute--the "controversy" under the first condition of the *PLT* test--arises under an OCSLA situs if a majority of the work called for by the contract is on stationary platforms or other enumerated OCSLA situses.[6]

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reasoning in the hope of finding an identical fact situation.'" (quoting *Smith*, 960 F.2d at 461--; Adams & Milhollin, supra note 4, at 100-01 ("Presumably, the lawyer now knows whether the indemnity at issue is enforceable, having completed the various analyses and determinations required under the OCSLA. It is highly likely, however, that the office aspirin bottle is now empty. . . . We can only hope that maritime lawyers everywhere take comfort in the fact that no matter how well they adhere to the tests and guidelines, one out of every two at the end of the exercise will have a different answer as to what law applies, and whether the indemnity is enforceable."); Kenneth G. Engerrand, Primer of Remedies on the Outer Continental Shelf, 4 LOY. MAR. L.J. 19, 20 (2005).

[6] As we discussed in Davis & Sons v. Gulf Oil Corp., 919 F.2d 313, 315-17 (5th Cir. 1990), reh'g denied, 924 F.2d 1054 (5th Cir. 1991), it is a common practice for companies contracting for work in the oilfield to enter into contracts in two stages. Typically, they first sign a "blanket contract" that may remain in place for an extended period of time. Later, they issue work orders for the performance of specific work, which usually incorporates the terms of the blanket contract. As we said in

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This approach is sounder because it applies contract principles rather than tort principles to a contract case. Applying tort rules would allow the fortuitous location of an accident to determine the situs--and the applicable law--of a contractual controversy. The tort-situs approach prevents commercial parties from reliably allocating risk in their contractual arrangements because they have no way of predicting where "controversies" might arise and thus no way of knowing which law will govern.

Using contract principles to establish the situs of a contractual dispute both maintains the longstanding rule treating contractual indemnity claims as separate from underlying tort claims and grants contracting parties a far greater measure of predictability and stability in allocating risk.

For the reasons set forth above, we hold that, in determining the first condition of the *PLT* test, a contractual indemnity claim (or any other contractual dispute) arises on an OSCLA situs if a majority of the performance called for under the contract is to be performed on stationary platforms

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Davis & Sons, where the contract consists of two parts, a blanket "contract followed by later work order, the two must be interpreted together."

Generally, each work order is for a discrete, relatively short-term job. Unless a contrary intent is reflected by the master contract and the work order, in determining situs in a contract case such as this, courts should ordinarily look to the location where the work is to be performed pursuant to the specific work order rather than the long term blanket contract.

or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A). It is immaterial whether the underlying incident that triggers the indemnity obligation occurs on navigable waters or on a platform or other OSCLA situs. A number of our cases have determined situs in a contractual indemnity case not by looking at the focus of the contract, but rather looking at where the underlying accident occurred which gave rise to the indemnity claim.[7] Many of those cases, we believe, ultimately

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[7] Judge Garza's straightforward dissent agrees with Seacor's position and relies on this line of cases. We have explained above why we decline to follow these cases.

Judge Owen's dissent adopts a position that neither of the parties nor their experienced admiralty attorneys argued to the district court, the panel, or the en banc court. She concedes that in tort cases, § 1333(a)(2)(A) of OCSLA directly adopts the law of the adjacent state as the law of the United States on artificial islands and fixed structures on the OCS. A contrary position is obviously foreclosed by the Supreme Court's decisions in *Rodrigue* and Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971). In those cases the Court directly applied the law of the adjacent state without regard to the state's conflict rules. Judge Owen contends, however, that in contract cases, § 1333 (a)(2)(A) should be interpreted differently. In contract cases, she argues that when this section of OCSLA adopts the "civil and criminal laws of each adjacent state," this language should be interpreted as adopting the adjacent state's conflict of law rules. We see no basis to read this section of OCSLA to directly apply the state's law in a tort case while adopting the state's conflict of law rules in a contract case. The section unambiguously adopts the "civil and [criminal] laws of the adjacent state" without distinguishing between the types of civil cases. We see no reason to treat contract cases and tort cases differently for choice of state law purposes since they are both "civil" cases.

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In tort cases, the Supreme Court has given us clear directions to directly adopt the adjacent state's law rather than to adopt that state's conflict rules. In Huson, the Court considered whether Louisiana's one year statute of limitations would bar a tort action which occurred on a platform on the OCS. *Id.* at 98-99. The court considered plaintiff's argument that the Louisiana one year statute should not apply because under Louisiana's conflict rules, "prescriptive" (as opposed to peremptive) rules are not binding outside the forum. *Id.* at 99-103. The Court rejected that argument and immediately following that discussion stated that "[s]ince the federal court is not, then, applying the law of another forum in the usual sense, ordinary conflict of law principles have no relevance." *Id.* at 102-03 (emphasis in original).

In *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981) the Court dealt primarily with whether state courts had concurrent jurisdiction over suits arising under OCSLA. The Court concluded that nothing within the Act prevented state jurisdiction but it reiterated the rule announced in Huson that "OCSLA does supercede the normal choice of law rules that the forum would apply." *Id.* at 482 n.8. The Court in *Rodrigue* directly applied Louisiana's wrongful death act to a wrongful death that occurred on a platform on the OCS without any discussion of conflict of law principles.

Judge Owen seems primarily concerned with the potential problem that the rule we adopt in this case does not cover the situation where the contract calls for work on platforms off the coast of both Louisiana and Texas under circumstances where the contract would be enforceable in one state but not in the other. That set of facts is not before us in this case and the legal issues such a case presents have not been briefed or argued. In this case, the parties agree that if the adjacent state law applies, Louisiana law, including the Louisiana Oilfield Indemnity Act, is the applicable law. And there is no evidence in the record that the contract called for work anywhere other than off the coast of Louisiana.

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reach the correct result for other reasons, and with respect to the extent (and only to that extent) the "tort" analysis was used in those cases to determine situs, we disagree and overrule that portion of those opinions.[8]

We therefore agree with the district court that the indemnity dispute in this case arose on an OCSLA situs because it is uncontested that a majority, if not all, of the work called for under the contract was to be performed on stationary platforms on the OCS.

The appellant does not challenge the district court's conclusion that the second and third *PLT* conditions are met and we agree with the district court's conclusion in this respect. As to the second condition, the district court determined that this contract, which called for maintenance work on a

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In sum, we believe Judge Owen's position is inconsistent with a plain reading of § 1333(a)(2)(A) of OCSLA, cannot be reconciled with the interpretation of that statute by the Supreme Court, and has no relevance to the issues in this case.

[8] The opinions we refer to include the following: Diamond Offshore Co. v. A & B Builders, 302 F.3d 531, 546 (5th Cir. 2002) (remanding for the district court to determine OSCLA situs based on the location of the injury); *Demette*, 280 F.3d at 500 (defining OSCLA situs in a contractual indemnity case by the location of the underlying tort); *Hodgen*, 87 F.3d at 1527 (stating that "the situs of a controversy in an OSCLA indemnity clause case is the location of the accident"); *Smith*, 960 F.2d at 459 (stating that the controversy occurred on an OCSLA situs because the injury occurred on a platform); *Hollier*, 972 F.2d at 664 (defining OSCLA situs in a contractual indemnity dispute by the location of the underlying tort).

stationary platform located on the OCS, was not a maritime contract and therefore maritime law did not apply of its own force. Grand Isle (District), 2007 U.S. Dist. LEXIS 71674, [WL] at *4. As to the third condition, as the district court noted, "[t]he Fifth Circuit has specifically held that 'nothing in the LOIA is inconsistent with federal law.'" 2007 U.S. Dist. LEXIS 71674, [WL] at *5 (quoting *Hodgen*, 87 F.3d at 1529). We agree with these conclusions.[9]

Having determined that all three conditions of the *PLT* test are met, it follows that the adjacent state law of Louisiana[10] 10 will apply as surrogate federal law and that the LOIA renders the

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[9] Our analysis adopts the *PLT* test in the order set forth by the *PLT* court. However, in determining whether state law applies in an OCSLA action, predicated on a contract, it is permissible to consider whether the contract at issue is a maritime contract before considering whether OSCLA situs has been established. Thus, if the contract sued upon is a maritime contact, maritime law applies and state law has no application so that the situs question need not be answered. However, if the contract sued upon is a non-maritime contract, then the situs question must be answered.

[10] Seacor also argues in passing that the provision in the Grand Isle contract that chooses maritime law as the applicable law should govern this contractual claim. We disagree. As we said in *PLT*: "We find it beyond any doubt that OCSLA is itself a Congressionally mandated choice of law provision requiring that the substantive law of the adjacent state is to apply even in the presence of a choice of law provision in the contract to the contrary." 895 F.2d at 1050 (citations omitted). See also *Gulf Offshore Co.*, 453 U.S. 473, 101 S. Ct. 2870, 69 L. Ed. 2d 784; *Texaco Exploration & Production, Inc. v. AmClyde Engineered Products Co.*, 448 F.3d 760 (5th Cir. 2006).

indemnity agreement unenforceable. The district court correctly granted summary judgment to Grand Isle and Gray.

AFFIRMED.

EMILIO M. GARZA, Circuit Judge, with whom JENNIFER WALKER ELROD and LESLIE H. SOUTHWICK, Circuit Judges, join, dissenting:

We are asked to determine whether the Outer Continental Shelf Lands Act choice-of-law provision, 43 U.S.C. § 1333(a)(2)(A), requires application of the Louisiana Oilfield Indemnity Act to an indemnity agreement triggered by an injury to a platform worker that occurred on a vessel on the high seas. Pursuant to a "focus-of-the-contract" test, and directly contrary to the Supreme Court's admonishment that Congress meant for situs to be determined by locale and not by the status of the employee or his work, the majority says yes. There being no nexus between the indemnification agreement and the Outer Continental Shelf, and because a breach of a contract based exclusively on an injury on the high seas cannot apply state law to the dispute, I would say no, and respectfully dissent.

I.

The choice-of-law provision under the Outer Continental Shelf Lands Act ("OCSLA") states in pertinent part:

> To the extent that they are applicable and not inconsistent with this Act or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that

> portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . .

43 U.S.C. § 1333(a)(2)(A). Importantly, § 1333(a)(2)(A) declares the law of the United States[1] to be state law only on certain specific and fixed locations. OCSLA's primary concern is "to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels, for the purposes of defining the applicable law because maritime law was deemed inapposite to these fixed structures." *Offshore Logistics v. Tallentire*, 477 U.S. 207, 217, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986). Thus, § 1333(a)(2)(A)

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[1] OCSLA sets forth the geographical boundaries of federal jurisdiction as follows:

> The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .

§ 1333(a)(1) (emphasis added). The parties do not dispute that OCSLA extends federal law to the areas of the OCS enumerated above.

requires a geographical nexus before state law applies.

The pertinent state law at issue here is the Louisiana Oilfield Indemnity Act ("LOIA"), which "declare[s] null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee." LA. REV. STAT. ANN. § 9:2780(A) (2009). Thus, if LOIA applies to the indemnity provision, it is unenforceable; if LOIA does not apply, the indemnity clause may be given effect.

OCSLA's plain language extends all laws--"civil and criminal"--of the adjacent state to "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." Put simply, § 1333(a)(2)(A) invites us to determine whether the situs of an indemnity agreement has a geographical nexus with the Outer Continental Shelf ("OCS"); if it does, we apply the relevant state law as surrogate federal law governing the agreement. If no situs is found, our inquiry begins and ends there.

II.

Grand Isle Shipyard, Inc. ("Grand Isle") entered into a Master Maintenance and Construction Services Contract ("MM CSC") with BP American Production Company ("BP") to provide repair and maintenance on fixed platforms on the OCS. Separately, Seacor Marine LLC ("Seacor") and BP entered into a Vessel

Charter Contract ("Charter") pursuant to which Seacor supplied vessels and crew to BP in service of BP's offshore activities. Both contracts contain nearly identical language designed to create reciprocal defense and indemnity obligations between and among BP contractors.

During the course of this contractual arrangement, Grand Isle employee Denny Neil was injured in a fall onboard the M/V SEA HORSE IV, a vessel owned and operated by Seacor and traveling on the high seas beyond Louisiana's territorial waters. Neil was off duty, and the SEA HORSE IV was transporting Neil from his work platform to his residential platform when he fell. According to deposition testimony, neither Neil nor the SEA HORSE IV was in physical contact with the platform at the time of the incident.

Neil filed suit against Seacor under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), a maritime statute, claiming negligent maintenance of the SEA HORSE IV resulting in his injury. Seacor settled this claim with Neil. After Neil filed his suit, Seacor tendered its defense and indemnity to Grand Isle pursuant to MMCSC paragraph 14.07 (emphasis added):

> Contractor [Grand Isle] agrees to defend, indemnify, release and hold company's [BP] other contractors [e.g., Seacor] harmless in accordance with the provisions of this Article 14 (to the extent such other Contractors execute cross indemnification provisions

> substantially similar to those contained in this section 14.07) from and against all claims, liabilities, damages, and expenses (including without limitation attorney's fees and other costs of defense), irrespective of insurance coverages for the following:
>
> (i) all injuries to, deaths, or illnesses of persons in contracted group CG:
>
> . . . whether or not occasioned by or the result in whole or in part of the negligence or fault, whether sole, concurrent, joint, active, or passive, of company's other contractors or any other entity or person or the unseaworthiness of any vessel . . . .

Grand Isle denied Seacor's tender for defense and indemnity and filed a complaint in district court seeking a declaratory judgment that Louisiana law applies as surrogate federal law under OCSLA. Seacor answered, alleging that, *inter alia*, "an action pending in the United States District Court for the Southern District of Texas . . . involves the dispute underlying this claim." Grand Isle subsequently moved for summary judgment on the ground that LOIA applies as surrogate federal law under OCSLA to nullify the indemnification provision in Seacor's contract with BP. Seacor filed a cross motion for summary judgment, arguing, *inter alia*, that Neil's injury occurred on a vessel while it was navigating in and on the high seas, and, therefore, under federal maritime law, Seacor would be entitled to indemnification for

Neil's injury by Grand Isle per the terms of the MMCSC.

III.

State law may be applicable to this dispute in one of two ways: either *ex proprio vigore* or as surrogate federal law under OCSLA's choice-of-law provision. Louisiana law does not apply to this dispute *ex proprio vigore* because Neil's injury occurred eleven geographical miles offshore, well beyond Louisiana's territorial waters. See 43 U.S.C. §§ 1301(b) (defining coastal "boundaries" of a state bordering the Gulf of Mexico as no farther than three marine leagues (3.45 geographical miles) into the Gulf). If Louisiana law applies to this dispute at all, it is only because it is incorporated as surrogate federal law by § 1333(a)(2)(A).

OCSLA's choice-of-law provision requires that a dispute have a geographical nexus with the OCS in order for state law to be applied as surrogate federal law. The dispute here involves breach of an indemnity provision incorporated within the MMCSC. Grand Isle neither alleges nor presents evidence in support of its motion for summary judgment that the MMCSC was written, confected, executed, or breached on the OCS. And although the MMCSC governs work done by Grand Isle on BP's platforms (which could provide a nexus to the OCS), the dispute in this case neither implicates the work on the platforms nor has any other connection to the OCS. Accordingly, the mere fact that the dispute involves a provision within the

MMCSC does not implicate the OCS such that OCSLA would apply.

Because the contract itself has no geographical nexus with the OCS, we look to the situs of the "controversy" to determine if § 1333(a)(2)(A) requires application of Louisiana law to this dispute. *See Union Tex. Petroleum Corp. v. PLT Eng'g*, 895 F.2d 1043, 1047 (5th Cir. 1990). This is an indemnity dispute; therefore, the indemnity provision of the MMCSC informs this determination. The MMCSC states that Grand Isle will "defend, indemnify, release and hold company's other contractors [e.g., Seacor] harmless . . . from and against all claims, liabilities, damages, and expenses" resulting from "all injuries to, deaths, or illnesses of persons in [the] contracted group." When a dispute arises under the indemnity provision, the underlying "injury" (or death or illness) becomes a contractual event which initiates contractual obligations under the indemnity agreement with Grand Isle. The location of the injury thus is critically important in our determination of whether, under § 1333(a)(2)(A), state law may be substituted as surrogate federal law to govern the dispute.

In the instant matter, since the indemnity agreement does not provide a geographical nexus with the OCS, § 1333(a)(2)(A) cannot be used to apply state law to the dispute. Neil's "injury" occurred on a vessel sailing the high seas that was not connected to or in any way touching a platform or any other situs attached to the OCS. Without any geographical nexus to the OCS, the plain language of § 1333(a)(2)(A)

prevents our application of Louisiana law, as surrogate federal law, to govern the adjudication of the dispute.

IV.

Supreme Court precedent, as well as our own OCSLA jurisprudence, confirms that situs is the pertinent inquiry in determining whether state law governs a particular dispute. An important early case, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), comprised two consolidated wrongful death cases, both of which involved accidents during the course of the decedents' work on offshore platforms. One worker was killed when a crane mounted on an artificial island collapsed and toppled onto a nearby barge; the deceased had been working on the crane at the time of the collapse. The other worker was killed when he fell from a derrick affixed to an artificial island while performing a test on a drill pipe. To determine whether § 1333(a)(2)(A) required application of state law as surrogate federal law over these wrongful death actions, the Supreme Court first noted that Congress's intent in enacting the statute "was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as those in question here on the outer Continental Shelf." *Id.* at 355. "This approach was deliberately taken in lieu of treating the structures as vessels, to which admiralty law supplemented by the law of the jurisdiction of the vessel's owner would apply." *Id.* Concluding that these accidents occurred on "islands, albeit artificial ones,"

the Supreme Court found § 1333(a)(2)(A) required application of state law in both disputes. *Id.* at 360.

More recently, in *Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986), two workers employed on drilling platforms off the coast of Louisiana were killed when a helicopter transporting them to shore crashed into the Gulf of Mexico. Their families filed wrongful death suits against the helicopter owner/operator under the Death on the High Seas Act (DOHSA), OCSLA, and Louisiana law. Among the questions that the Supreme Court faced was whether the families' DOHSA recovery could be supplemented by the remedies provided by state law through § 1333(a)(2)(A). In determining whether OCSLA's choice-of-law provision applied state law to the wrongful death disputes, the Supreme Court first looked to Congress's intent in enacting OCSLA, namely, "to treat the artificial islands covered by the Act as upland islands or as federal enclaves within a landlocked State, and not as vessels." *Tallentire*, 477 U.S. at 217. Maritime law, the controlling law on the high seas, was inapposite to disputes occurring on fixed platforms. *Id.* Federal law (or surrogate state law) was the appropriate choice of law governing disputes on artificial islands. *Id.* at 217-18.

The Supreme Court specifically rejected the argument that state law, via § 1333(a)(2)(A), should apply to these workers' wrongful death claims by virtue of their status as platform workers whose work occurred on OCS situses (artificial islands and fixed platforms). *Id.* at 218. Reasoning that "Congress

determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed," the Supreme Court looked to where the helicopter accident occurred to determine that the § 1333(a)(2)(A) requirements were not met and state law could not apply. *Id.* at 219. In *Tallentire*, the situs of injury was on the high seas, with no nexus to the OCS. Consequently, § 1333(a)(2)(A) did not require application of state law as surrogate federal law to adjudicate the dispute.

The seminal OCSLA choice-of-law case in this Circuit is *Union Texas Petroleum Corp. v. PLT Engineering*, 895 F.2d 1043 (5th Cir. 1990). In *PLT*, this court was asked to determine the applicable choice of law for a breach-of-contract dispute over *PLT*'s failure to pay subcontractors who worked to install a subsea pipeline pursuant to *PLT*'s contract with Union Texas. *Id.* at 1045-46. In reaching its conclusion, the court articulated three concerns--now deemed the three factors in the "*PLT* test"--to determine whether § 1333(a)(2)(A) permitted substitution of adjacent state law as surrogate federal law: "(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law." *Id.* at 1047.

Nowhere in *PLT* did the court discuss a "focus-of-the-contract" test. Rather, the court first

determined whether the "controversy" in dispute--namely, a controversy over the service contract--had a nexus with the geographical areas that statutorily comprise the OCS. To make this determination, the court examined the contract, under which "*PLT* was to design, fabricate, and install a gas transportation system from a platform owned by UTP, and its partners" off the Louisiana coast. *Id.* at 1045. Because construction of the gas system gathering line was the work for which *PLT* failed to tender payment, the court centered its situs inquiry on the location of the gathering line. The court found that "the gathering line exactly fits the statutory definition of an 'other device[] permanently or temporarily attached to the seabed . . . erected thereon for the purpose of . . . developing, or producing resources therefrom.'" *Id.* at 1047 (quoting 43 U.S.C. § 1333(a)(1). Moreover, the court found that "[t]he locations where the substantial work [constructing the gathering line] was done were covered situses-the subsoil or seabed; an artificial island; and an installation for the production of resources." *Id.* at 1047-48 (footnotes omitted). The court examined the location of "substantial work" performed on the pipeline because the dispute concerned *PLT*s failure to pay subcontractors who *worked* on that pipeline. *Id.* at 1047. There was no other analysis that could logically inform an OCSLA situs inquiry in that particular breach-of-contract dispute over payment for pipeline construction. This "substantial work" analysis resulted in the court's narrow holding that § 1333(a)(2)(A) "requires the application of Louisiana state law to non-maritime contract disputes arising from the construction of a

gathering line on the seabed of the outer Continental Shelf." *Id.* at 1045.

A number of subsequent cases concerning indemnity disputes followed the three-part *PLT* test and concluded in each that Louisiana law would be given effect under § 1333(a)(2)(A) because the injuries occurred on the OCS. For example, in *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992), the underlying injury was sustained by a Penrod employee working on an offshore platform affixed to the OCS. The employee was standing on the platform, leaning on horizontal fencing around the platform, in order to reach equipment on an adjacent barge. The fencing collapsed and the worker fell. The court determined that the indemnity dispute occurred on the OCS, noting that "[d]rilling platforms constitute 'artificial islands' under section 1333(a)(1)." *Id.* at 459. Because the "controversy" had a nexus with the OCS, § 1333(a)(2)(A) required application of state law as surrogate federal law over the indemnity dispute.

Similarly, in *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992), a platform worker slipped between the residential boat and the platform on which he worked; he was crushed and subsequently drowned. This court noted that platforms are generally considered OCS situses and therefore found that the indemnity agreement had a geographical nexus with the OCS because "*Hollier* was in physical contact with the platform at the time of his injury." *Id.* at 665.

Likewise, *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996), concerned an indemnity dispute over an injury sustained by a platform worker while transferring by swing rope from a fixed platform to a nearby vessel. The worker landed hard on the boat's dock, injuring his spinal cord. In undertaking its choice-of-law analysis, this court "[a]ssum[ed] . . . that *Hollier* and *Smith* state a rule in this circuit providing that the situs of the controversy in an OCSLA indemnity clause case is the location of the accident." *Id.* at 1527. The court found *Hollier* "established that when an injured worker is in contact with both a platform and a boat, the first factor of the *PLT* test is satisfied." *Id.* Because Hodgen was "in contact" with the platform via the swing rope when he sustained his injury on the vessel's deck, the court found an OCSLA situs present. *Id.* Therefore, "[a]ssuming that *Hollier* properly states the rule for the situs requirement in contractual cases"--namely, that the location of the accident is the correct situs to analyze for § 1333(a)(2)(A) purposes--OCSLA choice of law determined that Louisiana law would govern the indemnity dispute as surrogate federal law because the injury had a geographical nexus with the OCS. *Id.*

In this same vein, *Dennis v. Bud's Boat Rental, Inc.*, 987 F. Supp. 948 (E.D. La. 1997), concerned an indemnity dispute over injuries to a worker transferred via personnel basket from a vessel on the high seas to a vessel moored to a work platform. "[T]he accident occurred on the deck of a vessel as plaintiff was in the act of transferring to another vessel, but while plaintiff was in physical contact with a personnel basket attached to a crane on the

platform." *Id.* at 950. Undertaking a *PLT* analysis pursuant to this court's decision in Hodgen, the court found a geographical nexus with the injury and the platform because the worker's personnel basket was attached to a crane affixed to the platform. *Id.*

The district court could have properly ended its situs inquiry there. It did not. Instead, it noted "a trend to find OCSLA situs where 'the work required by the contract was performed on an offshore platform' even if situs is not strictly, physically met." *Id.* (quoting *Wagner v. McDermott*, 899 F. Supp. 1551, 1556 (W.D. La. 1994)). Based on this "trend"--notably inapplicable to the facts of the case before it, which involved an injury sustained while in contact with a personnel basket on an OCS platform--the Dennis court concluded that there was an OCSLA situs because the worker had "both physical and contractual connection with the platform." *Id.* In doing so, the *Dennis* court unnecessarily muddied the clear connection between physical injury and situs in our OCSLA jurisprudence.

Admittedly, as the *Dennis* court acknowledged, there is an alternative line of cases that emerged from *PLT*'s application of a "substantial work" analysis to determine the situs for OCSLA choice-of-law purposes. For example, *Wagner v. McDermott* involved a worker who allegedly suffered injuries when he slipped and fell on the deck of a residential barge adjacent to, but not connected to or a part of, a platform. 899 F. Supp. at 1552. This injury precipitated an indemnity dispute between the barge owner and several third-party defendants. The

McDermott court first considered the situs analysis under *Hollier*, a case that was directly analogous to the facts of the indemnity dispute before it. Applying *Hollier*'s situs analysis, the court noted that the inquiry was "defined by where the plaintiff's accident occurred" and acknowledged that under this standard, "the 'controversy' did not take place on an OCSLA situs." *Id.* at 1556. Accordingly, state law would not apply under § 1333(a)(2)(A).

Notwithstanding this conclusion, the *McDermott* court then purported to apply the three factors of the *PLT* test to arrive at a different outcome. It focused on the *PLT* court's discussion of the "substantial work" situs inquiry: "[T]he situs requirement could [also] be met when 'the locations where the substantial work pursuant to the contract was done were covered situses.'" *Id.* Ignoring that *PLT* discussed this "substantial work" inquiry in the context of a service contract dispute over payment for subsea pipeline work, not a dispute about an injury for which indemnification was sought--and contrary to *Tallentire's* admonishment that Congress meant for situs to be determined by the locale of the controversy and not by the status of the employee--the district court found the "substantial work" inquiry dispositive. The district court determined that the situs of the indemnity dispute was the OCS, "as the work required by the contract was performed on an offshore platform." *Id.* Consequently, the district court found

Louisiana law applied as surrogate federal law to the indemnity dispute.[2]

These two lines of OCSLA situs inquiry in indemnity disputes emerging from *PLT* are clearly in conflict with each other. The jurisprudence is admittedly muddled and in need of a clear resolution. Unfortunately, the resolution now proposed by the majority does not follow the statutory requirements of § 1333(a)(2)(A).

V.

Today, the majority proposes a new rule to evaluate what it believes the OCSLA situs is, in a contractual dispute. Under this rule, "the focus-of-the-contract test is the appropriate test to apply in determining the situs of the controversy in contract cases, and we adopt that rule for the circuit." Op. at 2. The "focus-of-the-contract" test would require us to look to where the contract contemplates that a majority of the work is to be performed. *Id.* The majority bases its holding on *PLT*'s breach-of-contract situs inquiry, examining "where the substantial work was done." *Id.* at 12. Therefore, according to the majority, "a contractual indemnity claim (or any other contractual dispute) arises on an OCSLA situs if a majority of the performance called for under the

[2] This court affirmed this decision solely on its analysis of whether maritime law applied and not with respect to the situs inquiry. See *Wagner v. McDermott, Inc.*, 79 F.3d 20, 22 (5th Cir. 1996) (adopting the district judge's "holding that the contract is non-maritime in nature" and "assum[ing] without deciding that [] OCSLA applies").

contract is to be performed on stationary platforms or other OCSLA situses enumerated in 43 U.S.C. § 1333(a)(2)(A)." *Id.* at 13. Significantly, the majority distinguishes this test from the OCSLA situs inquiry in tort cases, which would look simply to where the tort occurred to determine if § 1333(a)(2)(A) requires application of state law. *Id.* at 2.

However, there is no distinction between tort and contract in OCSLA's choice-of-law provision. The majority states that "[o]ur case law . . . requires us to distinguish between a contractual indemnity claim and the underlying incident." *Id.* at 11. But nowhere in *Rodrigue*, *Tallentire*, or any of our OCSLA jurisprudence does case law *support* or *demand* that we consider the situs of an indemnity claim to be something other than where the underlying incident occurred, and there is no justification for doing so now.[3] Section 1333(a)(2)(A)'s language plainly does

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[3] Notably, this statement about "our case law" requiring a tort-contract distinction in applying OCSLA's choice-of-law provision comes after a lengthy discussion of *Hollier*, *Smith*, and *Hodgen*, indemnity cases in which this court adopted the location of the underlying injury as the relevant situs for its § 1333(a)(2)(A) inquiry. *Sumrall v. Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002), cited by the majority to support its sweeping claim about our OCSLA jurisprudence, is not an OCSLA case. It has no bearing on the extent to which OCSLA extends state law to actions sounding in tort versus contract, and indeed, does not implicate OCSLA at all. Sumrall noted that an earlier case's indemnification dispute was "contractual in nature," thereby distinguishing that from the underlying injury dispute at bar, which sounded in tort. *Id.* at 319. However, this distinction does not support the majority's present decision to parse out tort and contract disputes for § 1333(a)(2)(A) purposes. *Sumrall* concerned

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not invite an inquiry into a contract's "focus" when determining whether a dispute occurs on the OCS. The majority takes pains to distinguish controlling Supreme Court OCSLA precedent in *Rodrigue* and *Tallentire* on the grounds that these were tort disputes rather than contractual disputes, and therefore the situs of the tort determined the OCSLA situs. However, nothing in either case calls for the distinction between tort and contract that the majority presently proffers. Rather, the focus has always been on the situs of the *controversy*.

As discussed above, *Rodrigue* concerned two consolidated wrongful death actions on stationary platforms attached to the OCS. Since these platforms were situses clearly delineated as part of the OCS under § 1333(a)(2)(A) ("artificial islands and fixed structures erected thereon"), the Supreme Court found that the "injuries" occurred on the OCS. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969). Conversely, in *Tallentire*, the Supreme Court determined that § 1333(a)(2)(A) did not extend state law to platform workers killed in a helicopter crash while in transit over the high seas because "[b]y its terms, OCSLA must be 'construed in such a manner that the character of the waters above the outer Continental Shelf as high seas . . . shall not be affected.'" *Offshore Logistics v. Tallentire*, 477 U.S. 207, 217, 106 S. Ct.

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an interpretation of the breadth of an indemnity clause and did not impute OCSLA's choice-of-law provision in any way.

2485, 91 L. Ed. 2d 174 (1986) (quoting 43 U.S.C. § 1332(2)).

Notably, in *Tallentire*, the Supreme Court rejected the argument that § 1333(a)(2)(A) required application of state law to the cause of action because the decedents were platform workers. *Id.* at 218. The Supreme Court stated:

> The extension of OCSLA far beyond its intended locale to the accident in this case simply cannot be reconciled with either the narrowly circumscribed area defined by the statute or the statutory prescription that the Act not be construed to affect the high seas which cover the Continental Shelf . . . .
>
> The character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case.

Id. at 218-19 (emphases added).

The Supreme Court pinpointed § 1333(a)(2)(A)'s delineated geographical area-- "that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon"--to determine that a nexus between the situs of the injury and the OCS is required for OCSLA's choice-of-law provision to apply. The Supreme Court noted that Congress intended for the proper situs inquiry under § 1333(a)(2)(A) to turn on the location of the incident giving rise to the claim, not on the

status of the individual as a platform worker. *Id.* at 219. The Supreme Court found "no special relevance" in the work the platform workers performed, or even the work contemplated by the contract under which the workers were employed, in determining the actual "situs" of the dispute. Instead, the Supreme Court found OCSLA's choice-of-law provision inapplicable because the location of the injury simply had no geographic nexus with the OCS.

The majority today nevertheless promotes a "focus-of-the-contract" test that regrettably employs the same status-based analysis that the *Tallentire* court specifically rejected. The work order on which the majority would have us "focus" has no connection whatsoever to the injury precipitating the instant dispute. Neil was not at work at the time of his injury. In evaluating where a work order contemplates the majority of the work will be performed, the majority is relying on the status of the workers performing under that work order to determine the OCSLA situs. Such analysis finds no support in *Tallentire*. Section 1333(a)(2)(A)'s situs inquiry is location-based, and if the triggering incident occurs off of the OCS, *Tallentire* requires that our OCSLA choice-of-law inquiry end there.[4] In the instant matter, the triggering incident occurred on board the SEA HORSE IV, which was close to, but not touching,

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[4] We agree with the majority that proper OCSLA choice-of-law analysis requires an inquiry into three areas: 1) the situs of the controversy; 2) whether federal maritime law applies of its own force; and 3) whether state law conflicts with federal law. *See PLT*, 895 F.2d at 1047.

Neil's residential platform, a fact neither party disputes. This "injury" situs has no physical nexus with the OCS; therefore, OCSLA's choice-of-law provision does not apply.

VI.

The issue of whether LOIA applies as surrogate federal law under OCSLA clearly implicates this court's decision in *PLT*, which sets forth this Circuit's controlling OCSLA choice-of-law three-prong test. As discussed above, the relevant inquiry for the purposes of this appeal is *PLT*'s first prong, or whether "[t]he controversy . . . arise[s] on a situs covered by OCSLA." *Union Tex. Petroleum Corp. v. PLT Eng'g*, 895 F.2d 1043, 1047 (5th Cir. 1990). Significantly, the first prong of *PLT* requires a determination of where the controversy arose, not where the work is done. If we find that there is no OCSLA situs--that is, no nexus between the controversy and the OCS--our inquiry ends at *PLT* step one.

The facts of *PLT* itself required a different inquiry from our present case only because *PLT* involved a service contract. *PLT* was not an indemnity case; no underlying injury was involved. Rather, as the majority describes it, *PLT* was "a pure contract case to collect unpaid invoices for the installment of a subsea pipeline and to impose a statutory lien on the pipeline under Louisiana law." Op. at 8-9. The *PLT* court's choice-of-law analysis was necessarily informed by where the work on the subsea line was performed because payment for that work was the central dispute. No other location logically comprises

the situs of the "controversy" over breach of payment for pipeline construction.

We simply do not have those facts before us in the instant indemnity matter. Neil was off duty as a platform worker when he was injured while being ferried to his residential platform. The location of his injury is not in dispute: he was on board the SEA HORSE IV. Therefore, we need look no further than the where the SEA HORSE IV was at the time of Neil's injury to complete our situs inquiry. The parties do not contest that this vessel was on the high seas and not in contact with an OCSLA situs. Consequently, § 1333(a)(2)(A) does not perm it Louisiana law, as surrogate federal law, to govern the adjudication of this dispute.

Moreover, the majority's holding improperly collapses *PLT*s step one inquiry (situs) into step two (whether federal maritime law applies of its own force) to form a singular test based solely on the "focus" of the dispute. We can properly consider the "nature" of the MMCSC in our § 1333(a)(2)(A) inquiry, but only in the analysis of *PLT* step two, to determine whether federal maritime law governs.

Davis & Sons v. Gulf Oil Corp., 919 F.2d 313, 315-17 (5th Cir. 1990), elucidates the proper test for determining whether a contract is maritime or non-maritime, a pertinent inquiry to the second prong of the *PLT* test: whether federal maritime law applies to the contract of its own force. Notably, Davis states that "[w]hether the blanket agreement and work orders, read together, do or do not constitute a

maritime contract depends, as does the characterization of any other contract, on the nature and character of the contract, rather than on its place of execution or performance." *Id.* at 316 (internal quotation marks and citation omitted). To determine the "nature and character of the contract," Davis analyzed six factors:

> [W]hat does the specific work order in effect at the time of injury provide? 2) [W]hat work did the crew assigned under the work order actually do? 3) [W]as the crew assigned to work aboard a vessel in navigable waters; 4) [T]o what extent did the work being done relate to the mission of that vessel? 5) [W]hat was the principal work of the injured worker? and 6) [W]hat work was the injured worker actually doing at the time of injury?

Id.

These factors entail an inquiry into where the majority of a contract's work was performed--in essence, a "focus-of-the-contract" inquiry, the very test the majority now proposes to determine whether a contract dispute occurs on an OCS situs. An evaluation of where a contract contemplates work will be performed necessitates an analysis of specific work orders, crew assignments, and whether these assignments relate to the mission of the vessel on which the injury occurred. Indeed, in determining whether Neil's injury occurred on an OCS situs, the district court relied on these very factors:

> At the time of the accident, Neil's work for the day was complete, and he was proceeding to the living quarters platform. Neil's work, which consisted mainly of platform repairs and grating repairs, was performed on platforms, not vessels. Neil's sole relationship to the vessel was as a passenger; he did not contribute to the mission of the vessel in any manner. Further, the work tickets from April 7, 2005 to May 7, 2005 demonstrate that the work performed pursuant to the MMCSC was performed on platforms, not on vessels.

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, No. 06-1405, 2007 U.S. Dist. LEXIS 71674, at *9 (E.D. La. Sept. 26, 2007).

Thus, to determine whether "substantial work" under the MMCSC was performed on OCS situses, the district court looked to specific work orders in effect at the time of Neil's injury, the work Neil was assigned to do, the extent Neil's work related to the mission of the SEA HORSE IV, Neil's principal work, and what work (if any) Neil was doing at the time of the accident. That is, the district court employed a Davis inquiry, to determine not whether federal maritime law applies of its own force to a contract, but rather to come to the conclusion that Neil was injured on an OCS situs. The majority now adopts the district court's misplaced Davis-factor OCSLA situs analysis and "agree[s] with the district court that the indemnity dispute in this case arose on an OCSLA situs because it is uncontested that a majority, if not

all, of the work called for under the contract [MMCSC] was to be performed on stationary platforms on the OCS." Op. at 13. The majority reaches this conclusion notwithstanding that the injury that is the basis of the indemnification action is wholly unrelated to any work being performed under the MMCSC.

However, if we examine the "nature and character of the contract" at both *PLT* step one (situs) and step two (whether federal maritime law applies), then we erase the distinction between the two inquiries required by both the statute and *PLT*. Indeed, neither Davis nor any of our controlling OCSLA precedent demands a "focus-of-the-contract" analysis for § 1333(a)(2)(A)'s situs inquiry. Given that, the majority's new test is at best redundant, at worst irrelevant.

We must take care not to collapse these two distinct prongs of inquiry. In *Hodgen*, this court declined to "short-circuit" the situs inquiry by solely analyzing the dispute's "focus" in determining whether OCSLA's choice-of-law provision applied. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1525 (5th Cir. 1996) (specifically rejecting the assertion that "the only inquiry relevant to the choice of law in matters arising out of oil exploration activities on the Outer Continental Shelf was the status of the contract as maritime or non-maritime," referring to reasoning in *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393 (5th Cir. 1991)). Instead, Hodgen held that "[t]he proper test for deciding whether state law provides the rule of decision in an OCSLA case

remains the three-part *PLT* test." *Id.* at 1526. As both § 1333(a)(2)(A) and the *PLT* test demand, this court must separate its inquiry and evaluate situs and contract status independently.

It cannot be overstated that the work contemplated by the MMCSC in the instant matter is factually and legally irrelevant to the indemnity provision; the incident (injury, death, or illness) triggers the indemnity provision. That is, there is no need to analyze where the "focus of the contract" takes place, i.e., "where the contract contemplates that most of the work will be performed," when a discrete incident--the underlying injury--precipitates an indemnity dispute. The "work "simply has no connection to a determination of whether an indemnity dispute arises on the OCS because the "work" did not trigger the dispute. What is factually and legally relevant to the indemnity provision is the "injury" to an employee covered under the MMCSC. This injury triggers the dispute. Therefore, if the underlying injury did not occur on any structure affixed to the OCS, there is no OCS situs, and Louisiana law does not apply. In this case, the indemnity provision could apply anywhere because the injury, death or illness could occur anywhere. It so happened that the incident occurred away from any recognized OCS situs.

VII.

The majority's "focus-of-the-contract" test, "look[ing] to where the contract contemplates that most of the work will be performed," disregards

Tallentire's interpretation of § 1333(a)(2)(A), which classifies situs "principally by locale," not by the "character" of the work under the contract. *Offshore Logistics v. Tallentire*, 477 U.S. 207, 219, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986). The test purports to provide "predictability and stability" in determining how OCSLA's choice-of-law provision applies to indemnity contracts. However, the proposed test creates predictability only by equating the "controversy" with "majority of the work," even though the work performed under the contract does not inform the situs of an indemnity dispute. Tautologically, by assuming the "majority of the work" is the definitive situs test for choice of law in a contract dispute, the "choice of law" is determined by the test, rather than by the statute.

Additionally, the majority fails to provide guidance for application of its "focus-of-the-contract" test to future cases with different factual situations. Apparently the "contract" (among the many contracts involved in this dispute) that we are meant to be analyzing is a work order rather than the MMCSC itself, as the opinion indicates in a footnote ("Unless a contrary intent is reflected by the master contract and the work order, in determining situs in a contract case such as this, courts should ordinarily look to the location where the work is to be performed pursuant to the specific work order rather than the long term blanket contract." *Id.* at 12 n.6). But the opinion fails to address the potential challenges in this test's application. Without any specifics, what comes off as a precise test on the pages of our reporter is, in fact, an amorphous term for lower courts and litigants to

grapple with in future cases. Whose work order(s) are we analyzing: Seacor's, as the party seeking indemnity, or Grand Isle's, as the employer of the injured party?

Moreover, what do we mean by "majority"? Majority of hours worked? The majority proportion of work designated by the contract? Should we factor in the number of employees involved to make our determination? Is the "majority" of the work prospective or retrospective in application, or some combination thereof?

The majority proffers this "majority of the work" standard without sufficient substantiation for how it is to be applied, let alone why we are to be looking to work at all, when the "work" does not inform an indemnity dispute triggered by a discrete act (the underlying injury). At the very least, looking to the location of the injury for determining OCSLA situs in indemnity disputes is more precise given that an injury is a discrete event occurring in a specific location, and is the contractually anticipated event that triggers application of the indemnity provision in the first place. More importantly, this is also the situs test articulated by the Supreme Court in *Rodrigue* and *Tallentire*.

The majority fails to acknowledge that when a dispute arises under the indemnity provision, the underlying "injury" (or death or illness) is no longer merely a tort. The "injury" becomes a contractual event as the act pursuant to which a contractor may seek indemnification. The work contemplated by the

MMCSC in the instant matter is factually and legally irrelevant to the indemnity dispute. Indeed, if the majority correctly applied their test and truly examined the "focus-of-the-contract" at issue, they would focus on the indemnity agreement, not a work order.

The majority's attempt to harmonize our OCSLA jurisprudence with a predictable new rule accomplishes neither harmony nor predictability, and comes at the expense of a proper interpretation of § 1333(a)(2)(A)'s situs requirement. The statute outlines how we are to apply it, and we would be remiss to read more into it than that.

Accordingly, I dissent.

PRISCILLA R. OWEN, Circuit Judge, dissenting.

Our court has considered this case en banc in an effort to bring at least some uniformity and predictability to the law in this Circuit regarding the applicability of the Outer Continental Shelf Lands Act (OCSLA)[1] to contractual indemnity provisions. That is a laudable and responsible undertaking, given the confusion in our jurisprudence in this area. I respectfully submit, however, that the test the court adopts today sweeps too broadly. Nor does the "majority-of-the-work" test find support in the express provisions of OCSLA, state law applied as federal law, or federal common law.

This case presents a difficult question: what law governs an indemnity provision in a contract when the act or omission that gave rise to the underlying tort claim occurred on navigable water on the Outer Continental Shelf (OCS), but the indemnity obligation is contained in a contract that primarily calls for work to be performed on stationary platforms on the OCS, although it also contemplates activities on navigable waters? It is not clear from OCSLA, at least to me, what law Congress intended to govern contractual obligations under these circumstances. A number of arguments can be made, as will be considered below, regarding the correct tack to take.

The court has today fashioned a choice-of-law mechanism that turns on where the majority of the

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[1] 43 U.S.C. §§ 1331 *et seq.*

work is to be performed. While I agree that choice-of-law principles must apply under OCSLA with regard to contracts to which more than one body of substantive law might apply, I would apply either federal common law choice-of-law principles or Louisiana's choice-of-law code provisions. The Supreme Court asked and left unanswered questions in *Gulf Offshore Co. v. Mobil Oil Corp.*[2] as to whether federal common law or a state's law should be applied as federal law under OCSLA if there is a conflict between the federal law and state law. Because the parties have not addressed the issues that pertain to such an analysis, I would remand to the district court for further proceedings.

I

The facts in this case are somewhat complicated because several contracts are involved, and Seacor is seeking indemnity from Grand Isle pursuant to a provision in a contract between Grand Isle and BP American Production Company. Seacor is not a party to that contract but is an express third-party beneficiary.

Grand Isle agreed with BP to indemnify each of BP's other contractors, such as Seacor, from claims made by Grand Isle employees if the contractor seeking indemnity had executed an agreement with BP extending reciprocal indemnity to Grand Isle. The master service agreement

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[2] 453 U.S. 473, 487-88, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981).

between Grand Isle and BP, in which the indemnity provision at issue is found, provides that BP contractors are third-party beneficiaries of this indemnity agreement. Similar indemnity provisions are contained in Seacor's Vessel Charter Contract with BP.

The BP/Grand Isle agreement contemplates that Grand Isle employees will perform work on fixed platforms in the Gulf of Mexico, but it also expressly provides that BP will furnish transportation for Grand Isle employees from the shore to the platforms[3] 3 and room and board offshore.[4] Accordingly, the BP/Grand Isle contract acknowledges that activities undertaken in furtherance of the contract will occur both on navigable waters as well as on the offshore platforms. A Grand Isle employee was injured on Seacor's vessel while in transit between an offshore platform used for living quarters and the offshore platform on which he had been working. The employee recovered from Seacor, and Seacor seeks indemnity from Grand Isle.

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[3] Article 2.04 provides: "Unless otherwise agreed in writing, Company [BP] shall furnish, at its cost and expense, transportation for Contractor's [Grand Isle's] personnel, equipment, and materials between Company's [BP's] designated shorebase or heliport and the offshore Work location."

[4] Article 2.06 provides: "Company [BP] shall provide room and board at the offshore Work location for Contractor's [Grand Isle's] personnel performing services under this Contract."

While third-party beneficiary indemnity agreements may not obtain in every or even most agreements pertaining to work on offshore platforms on the OCS, it would seem that many OCS-related contracts will contemplate that activities undertaken in furtherance of the contract will occur not only on offshore platforms, but on or over navigable waters because the workers will necessarily have to traverse the OCS to reach offshore platforms. There are at least two bodies of law that could arguably apply to indemnity provisions in such contracts: general maritime law[5] or the law of the adjacent state applied as federal law. It is also possible that a contract could call for work on multiple platforms, some of which are offshore one state and others offshore another. This increases the potential sources of law that might be applied to indemnity provisions. The court's decision today reaches all such contracts.

It is also conceivable that a single contract could provide for work onshore, in states that are not adjacent to the OCS, as well as work on the OCS. The court's decision appears to reach contracts in which only a small percentage of the work to be performed occurs offshore.

Another notable result of the court's test is that it gives no effect to contractual choice-of-law

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[5] See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218-19, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986) (holding that admiralty jurisdiction was properly invoked in a suit by survivors of offshore workers who perished in a helicopter crash while being transported from an offshore platform to shore).

provisions. The majority-of-the-work test is the only factor to be considered if the contract is not a maritime contract and applicable state law is not inconsistent with federal law.

In the present case, the master service agreement between BP and Grand Isle provides that

> whenever performance of this contract is in any way related to maritime activity, the general maritime laws of the United States shall govern the validity, construction, interpretation, and effect of this contract, excluding any choice of the law rules which would otherwise require the application of laws of any other jurisdiction.

Grand Isle and BP agreed that

> [i]n the event maritime law is held to be inapplicable by a court of competent jurisdiction, the laws of the state of Oklahoma shall apply, unless (i) otherwise provided in this contract or (ii) application of such law to a particular provision would prevent enforcement of such provision, in which case the law applicable to such provision shall be any potentially applicable law that would allow enforcement of said provision as written.

The majority-of-the-work test means that choice-of-law provisions will be ignored in a contract that covers activities in more than one area of the OCS as well as related activities on the high seas.

For example, a contract may encompass work on a platform offshore Louisiana and work on another platform offshore Texas, and the parties may specify that Texas law will govern all issues. Applying the court's test, if a majority, even a slim majority, of the work is to be performed in Louisiana, then Louisiana law will govern all aspects of the contract as federal law. An injury to a worker that occurred on a platform offshore Texas may give rise to a contractual claim for indemnity, but the indemnity claim will be governed by substantive Louisiana law as federal law even though (1) the parties agreed Texas law would apply, (2) the injury occurred in an area offshore Texas and Texas law will govern any personal injury claims as federal law, and (3) Louisiana state courts applying Louisiana law might not give effect to the Louisiana Offshore Indemnity Act (or LOIA)[6] under similar facts that did not concern the OCS.[7] Outside the indemnity area, routine breach-of-contract issues, such as whether a breach occurred, whether the breach was material, and the types of damages available, would be governed by Louisiana law as federal law even though the parties agreed that Texas law would apply to the contract and substantial work occurred offshore Texas.

The majority-of-the-work test appears to apply to all contractual obligations, even though generally accepted choice-of-law principles recognize that

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[6] LA. REV. STAT. ANN. § 9:2780(A).

[7] See, e.g., *King v. I.E. Miller of Eunice, Inc.*, 07-167, p. 6 (La. App. 3 Cir. 11/21/07); 970 So. 2d 703, 707.

differing law may apply to differing provisions of a contract.[8] The majority-of-the-work test selects the

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[8] See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. d ("Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states."); see also LA. CIV. CODE ANN. art. 3515 cmt. d, which provides:

> (d) Issue-by-issue analysis and depecage. The use of the term "issue" in the first paragraph of this Article is intended to focus the choice-of-law process on the particular issue as to which there exists an actual conflict of laws. When a conflict exists with regard to only one issue, the court should focus on the factual contacts and policies that are pertinent to that issue. When a conflict exists with regard to more than one issue, each issue should be analyzed separately, since each may implicate different states, or may bring into play different policies of these states. Seen from another angle, each state having factual contacts with a given multi-state case may not have an equally strong interest in regulating all issues in the case, but only those issues that actually implicate its policies in a significant way.
>
> This so-called issue-by-issue analysis is an integral feature of all modern American choice-of-law methodologies and facilitates a more nuanced and individualized resolution of conflicts problems. One result of this analysis might be that the laws of different states may be applied to different issues in the same dispute. This phenomenon is known in conflicts literature by its French name of depecage. Although infrequently referred to by this name, this phenomenon is now a common occurrence in the United States and has received official recognition in Europe. This Article does not prohibit depecage. However, depecage should not be pursued for its own sake. The unnecessary splitting of the case

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substantive law of a single state (excluding choice-of-law principles) to serve as borrowed federal law for all contractual issues.

The court does not explain how the majority-of-the-work test will affect contractual claims that relate to property. Will contractual rights and substantive law regarding structures or pipelines attached to the seabed on the OCS be governed by one state's law even though the structures or pipelines are found across a broad expanse of the OCS, some in areas adjacent to Texas, others in areas adjacent to Louisiana, Mississippi, or Alabama?

The proper application of OCSLA presents difficult questions, but I submit that Congress, in enacting OCSLA, did not intend to jettison well-recognized principles that determine what law will govern particular contractual provisions. Congress's goal in enacting OCSLA was to "provide a comprehensive and familiar body of law."[9]

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should be avoided, especially when it results in distorting the policies of the involved states.

[9] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), overruled in part on other grounds by *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

II

The starting point in determining what OCSLA requires is the Act itself. Section 1333(a)(1) provides that:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State . . . .[10]

As the Supreme Court has stated, "OCSLA declares the Outer Continental Shelf to be an area of exclusive federal jurisdiction."[11] OCSLA further provides that

> [t]o the extent that they are applicable and not inconsistent with this subchapter or

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[10] 10 43 U.S.C. § 1333(a)(1).

[11] *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981) (internal quotation marks omitted).

> with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . . . [12]

It is this provision of OCSLA that directs courts to apply federal law to the subsoil and seabed of, and artificial islands and fixed structures on, the OCS, but to borrow "applicable and not inconsistent" state law. OCSLA does not expressly mention contracts that pertain to such artificial islands and structures.

There are a number of possible interpretations of OCSLA's applicability to contracts. The first question that must be answered is whether Congress intended the extended geographic boundaries of adjacent states to determine what law applies to any contractual provision touching a structure within a particular state's extended boundaries, without regard to choice-of-law principles. Notably, the court's opinion does not conclude that geographic boundaries are determinative. Under the majority-

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[12] 43 U.S.C. § 1333(a)(2)(A).

of-the-work test, a single state's law will be selected even if the contract pertains to work in more than one state's adjacent area. The court has employed a choice-of-law test, but not one derived from "the normal choice-of-law rules that the forum would apply."[13]

However, if the geographic boundary is determinative, then the question remains, do courts look to the geographic location of the underlying occurrence that gives rise to the contractual dispute, or should the contract's relationship to a geographic area be considered instead? If the contract is considered, there are numerous possibilities, from a geographic perspective. Should courts look to the area in which the contract contemplates that some, a substantial amount, or a majority of the work has been performed? Alternatively, should the question be where the work will be performed over the life of the contract? Should courts instead consider the location of the work the injured party had been performing or was about to perform? Should we look to which fixed structure the worker was en route in furtherance of the contract, or leaving, when injured? Judge Garza's dissenting opinion concludes that the geographic location of the underlying injury giving rise to the contractual dispute is determinative. This test is appealing because it is easily applied. I am not persuaded, however, that the text of OCSLA supports it.

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[13] Gulf Offshore Co., 453 U.S. at 482 n.8.

The concept that we consider only geography and not choice-of-law principles when the OCS is involved is derived directly from decisions of the Supreme Court. The Court has construed OCSLA and said in *Chevron Oil Co. v. Huson* that "[s]ince the federal court is not, then, applying the law of another forum in the usual sense, ordinary conflict of laws principles have no relevance."[14] The Supreme Court subsequently cited this statement in support of its conclusion in a footnote in Gulf Offshore Co. v. Mobil Oil Corp. that "OCSLA does supersede the normal choice-of-law rules that the forum would apply."[15]

The Court's statements regarding choice of law must be considered in context. Both cases involved primarily tort (personal injury) actions.[16] The Court was not called upon to consider whether choice-of-law principles have "no relevance" in contract actions.

The Supreme Court's actual holding in *Chevron Oil Co. v. Huson* was that Louisiana's statute of limitations governed an injured worker's suit for personal injuries.[17] State law was applied as federal law, and accordingly, the Court reasoned that "[s]ince the federal court is not, then, applying

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[14] 404 U.S. at 102-03.

[15] 453 U.S. at 482 n.8; see also *Id.* at 486 ("The statute thus contains an explicit choice-of-law provision.").

[16] *See Id.* at 480-85; *Chevron Oil Co.*, 404 U.S. at 98.

[17] 404 U.S. at 102-03.

the law of another forum in the usual sense, ordinary conflict of laws principles have no relevance. [The Louisiana statute of limitations] is 'applicable' in federal court under the Lands Act just as it would be applicable in a Louisiana court."[18] This is far from an all-encompassing rejection of choice-of-law principles that pertain to contracts.

In *Gulf Offshore Co. v. Mobil Oil Corp.*, Mobil had sued Gulf for contractual indemnity after a Gulf employee was injured on a vessel chartered by Mobil.[19] The question actually decided in that case was whether federal courts have exclusive jurisdiction over personal injury and indemnity claims arising under OCSLA.[20] The injury occurred offshore Louisiana, and there was no argument before the Court that another adjacent state's law applied or that general maritime law applied either to the personal injury claim or the contractual indemnity provision. The Supreme Court simply observed that Louisiana law applied as federal law under OCSLA to the personal injury action.[21]

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[18] *Id.*

[19] 453 U.S. at 476 & n.1.

[20] *Id.* at 475.

[21] *Id.* at 481. The Supreme Court subsequently noted in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986), that "no question was even raised in *Gulf Offshore* regarding whether OCSLA applied to an accident aboard a vessel adjacent to the platform." See also *Id.* at 219 ("[T]he facts of [*Gulf Offshore* and *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969)] make clear that OCSLA was presumed applicable not because of the status of the decedents but

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Indeed, there was only scant mention of the contractual indemnity provision. Nor was any contention made in *Gulf Offshore* that the indemnity provision was unenforceable under Louisiana's Oilfield Indemnity Act, because the injury in that case occurred in 1975, before the Louisiana law was enacted in 1981.[22] The Supreme Court did not hold that courts are foreclosed from applying an adjacent state's choice-of-law principles when the adjacent state would consult its choice-of-law rules in deciding whether a statutory provision should be applied to render a contractual indemnity provision unenforceable.

It is unquestionably our obligation to apply the Supreme Court's precedent faithfully. That does not mean that we should unquestioningly assume that the Court's statements in one context are binding precedent in other, demonstrably different, contexts. I respectfully submit that we should not consider the Supreme Court's conclusion that choice-of-law principles do not apply to tort actions as a binding determination that resort cannot be had to choice-of-law principles in order to determine what substantive law governs a contract. In other areas of the law, the Supreme Court has recognized that different concepts apply in deciding what law governs a contract as distinguished from a tort.[23] For

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because of the proximity of the workers' accidents to the platforms and the fact that the fatalities were intimately connected with the decedents' work on the platforms.").

[22] 1981 La. Acts, No. 427.

[23] *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 23, 125 S. Ct. 385, Continued

example, the Supreme Court has said that in determining whether a contract is a maritime contract, "[t]he boundaries of admiralty jurisdiction over contracts--as opposed to torts or crimes--being conceptual rather than spatial, have always been difficult to draw."[24] The Court explained, "To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case."[25] "Nor can we simply look to the place of the contract's formation or performance."[26] In discussing the seminal decision of *Kossick v. United Fruit Co.*,[27] the Court said, "It did not matter that the site of the inadequate treatment--which gave rise to the contract dispute--was in a hospital on land."[28] Rather, whether the contract was a maritime contract turned on considerations divorced from the location of the treatment that the shipowner promised to provide to the injured seaman.[29]

It would seem that some choice-of-law rules must be applied to determine whether a contract is governed by OCSLA and if so, which adjacent state's

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160 L. Ed. 2d 283 (2004)

[24] *Id.* (internal citation and quotation marks omitted).

[25] *Id.*

[26] *Id.* at 24.

[27] 365 U.S. 731, 81 S. Ct. 886, 6 L. Ed. 2d 56 (1961).

[28] *Norfolk S. Ry. Co.*, 543 U.S. at 25.

[29] *See Id.* at 24-25.

law is borrowed as federal law, to the extent it is not in conflict with federal law.

III

If Congress did not intend in OCSLA to foreclose consultation of choice-of-law principles that apply to contracts, then the next question that must be answered is what choice-of-law principles should govern. The possible choices include federal common law choice-of-law principles applicable to contracts, the application of the "adjacent state's" choice-of-law principles, or the application of the forum state's choice-of-law principles.

The Supreme Court has left open whether state law applied as federal law under OCSLA or federal common law prevails when the result would differ depending on which body of law applied. In *Gulf Offshore Co. v. Mobil Oil Corp.*, one issue was whether, in an OCSLA case, the jury must be instructed that damages for lost future wages are not subject to federal income taxation.[30] The Court explained that "[o]ur first task is to determine the source of law that will govern."[31] To do so, "a court must consider the content of both potentially applicable federal and state law."[32] The Court observed that under federal common law, a defendant was entitled to such an instruction in an

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[30] 453 U.S. 473, 485, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981).

[31] *Id.*

[32] *Id.* at 486.

Federal Employers' Liability Act case.[33] The Court concluded that "[i]f Congress had been silent about the source of federal law in an OCSLA personal injury case, Liepelt would require that the instruction be given."[34] "But Congress was not silent," the Court noted,[35] and it remanded the case to state court "for a determination of whether Louisiana law requires the instruction and, if it does not, whether *Liepelt* displaces the state rule in an OCSLA case."[36] Its reasoning for doing so was as follows:

> [Congress] incorporated for this case the applicable law of Louisiana, but only "[t]o the extent [it is] not inconsistent" with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," *Liepelt* controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. *Chevron Oil v. Huson*, 404 U.S., at 104, 92 S.Ct., at 354. In Chevron, we held that Louisiana rather than federal common law provided the

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[33] *Id.* (citing *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 498, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980)).

[34] *Id.* at 487.

[35] *Id.*

[36] *Id.* at 488.

> federal statute of limitations for personal injury damages actions under OCSLA. We recognized that "Congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." *Id.*, at 104-105, 92 S.Ct., at 354. In this case, we face an analogous question: does the incorporation of state law preclude a court from finding that state law is "inconsistent" with a federal common-law rule generally applicable to federal damages actions?
>
> We need answer this question only if Louisiana law would not require that the instruction be given upon timely request.[37]

It would therefore seem necessary to determine if there is federal common law generally applicable to determine what law governs contracts. If so, is that law inconsistent with Louisiana law, and if there is a conflict, does federal common law displace Louisiana law in an OCSLA case? In this regard, I note only that circuit courts have concluded that a federal common law choice-of-law analysis should be conducted when the issue is a federal question,[38] and that in the absence of guidance from

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[37] *Id.* at 487-88.

[38] *See Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 n.8 (3d Cir. 1992); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294-95 (1st Cir. 1988); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 795 (2d Cir.

Continued

Congress, courts have relied upon the Restatement (Second) of Conflicts of the Law for the content of federal common law.[39]

In the present case, Louisiana is unquestionably the adjacent state. But in other fact patterns, determining the "adjacent state" for purposes of deciding what law governs a contractual provision presents many of the same conundrums faced when attempting to apply geographic boundaries.

With regard to Louisiana law, at least one relatively recent intermediate appellate court decision indicates that Louisiana courts would first consult applicable choice-of-law Louisiana code provisions before deciding if Louisiana's Oilfield Indemnity Act eviscerates a contractual indemnity agreement. In *King v. I.E. Miller of Eunice, Inc.*, Grey Wolf, a corporation domiciled in Texas, and I.E. Miller, a corporation domiciled in Louisiana, entered into a master service agreement that contained

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1980) ("This is a federal question case . . . and it is appropriate that we apply a federal common law choice of law rule . . . .").

[39] *See Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 81 (2d Cir. 2007) ("[W]hen conducting a federal common law choice-of-law analysis, absent guidance from Congress, we may consult the Restatement (Second) of Conflict of Laws."); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) ("Federal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws."); *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir. 1997) ("Federal common law applies to choice-of-law determinations in cases based on . . . admiralty. . . . Federal common law follows the approach of the Restatement (Second) of Conflicts of Laws.").

reciprocal indemnity provisions and provided that Texas law would apply to any issue arising under the contract.[40] The agreement contemplated work in four states, including Texas and Louisiana.[41] A verbal work order was issued by Grey Wolf for work to be performed in Louisiana, and its employee, a Louisiana resident, was injured in the course of that work[42] due to I.E. Miller's negligence.[43] The Louisiana corporation (I.E. Miller) sought indemnity from the Texas corporation (Grey Wolf). The Louisiana court held that Texas law applied and refused to void the indemnity agreement under Louisiana's Oilfield Indemnity Act.[44] In reaching that decision, the Louisiana court first applied choice-of-law provisions contained in Louisiana Civil Code articles 3540,[45] 3537,[46] 3515,[47] and comment (b)

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[40] 07-167, p. 1 (La. App. 3 Cir. 11/21/07); 970 So. 2d 703, 704.

[41] *Id.* at 706.

[42] *Id.*

[43] *Id.* at 704.

[44] *Id.* at 707.

[45] That provision states: "All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537."

[46] Article 3537 provides:

> Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

Continued

to article 3515.[48] Slightly more than half (51.78%) of the work under the master service agreement was

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That state is determined by evaluating the strength and pertinence of the relevant policies of the involved states in the light of: (1) the pertinent contacts of each state to the parties and the transaction, including the place of negotiation, formation, and performance of the contract, the location of the object of the contract, and the place of domicile, habitual residence, or business of the parties; (2) the nature, type, and purpose of the contract; and (3) the policies referred to in Article 3515, as well as the policies of facilitating the orderly planning of transactions, of promoting multistate commercial intercourse, and of protecting one party from undue imposition by the other.

[47] Article 3515 provides:

Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.

That state is determined by evaluating the strength and pertinence of the relevant policies of all involved states in the light of: (1) the relationship of each state to the parties and the dispute; and (2) the policies and needs of the interstate and international systems, including the policies of upholding the justified expectations of parties and of minimizing the adverse consequences that might follow from subjecting a party to the law of more than one state.

[48] Comment (b) to Article 3515 provides:

The objective is to identify "the state whose policies would be most seriously impaired if its law were not applied to that [particular] issue", that is, the state which, in light of its relationship to the parties and the dispute and its policies rendered pertinent by that relationship, would bear the most serious legal, social, economic, and other consequences if its law were not applied to that issue.

performed in Texas, approximately 30% was performed in Louisiana, and approximately 17% was performed in both Texas and Louisiana,[49] although the appellate court did "not give much weight to this information."[50] The court concluded "that the relationship of Louisiana is stronger to each party than the relationship of Texas to each party,"[51] but the court applied Texas law because the parties "would justifiably expect to be subjected to the law of Texas and would suffer minimal adverse consequences if subjected to that state's law"[52] and because "Texas' policy of upholding contracts which are freely and voluntarily entered into far outweighs Louisiana's policy of protecting oilfield subcontractors."[53] The court also candidly expressed its parochial concerns, explaining that Louisiana's oilfield indemnity law was designed to protect Louisiana subcontractors, and if enforced in this case, the law would prohibit a Louisiana corporation from obtaining indemnity from a Texas corporation.[54] The court held that because Texas law would apply under the parties' choice-of-law provision as well as in the absence of that provision,

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[49] King, 970 So. 2d at 706.

[50] *Id.* at 706 n.2.

[51] *Id.* at 706.

[52] *Id.* at 706-707.

[53] *Id.* at 707.

[54] *Id.*

the trial court erred in voiding the mutual indemnity provision.[55]

This court has applied Louisiana's choice-of-law code provisions as the initial step in determining whether the Louisiana Oilfield Indemnity Act applied to render unenforceable indemnity provisions at issue in a diversity case in which the injury had occurred in Louisiana state waters.[56] After a lengthy analysis of the factors set forth in Louisiana's civil code provisions regarding choice of law, we concluded that Louisiana law would govern in the absence of the choice-of-law provision,[57] and that application of Texas law under the choice-of-law provision would violate Louisiana public policy as expressed in the Oilfield Indemnity Act.[58] 58 We consequently refused to enforce the indemnity provision.[59]

Because our existing precedent does not consider choice-of-law principles in a case in which OCSLA may apply, the parties have not briefed the questions that arise. I would remand to allow the parties and the district court to consider further what law governs the indemnity provisions at issue.

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[55] *Id.*

[56] *See Roberts v. Energy Dev. Corp.*, 235 F.3d 935 (5th Cir. 2000).

[57] *Id.* at 943.

[58] *Id.*

[59] *Id.* at 944.

IV

The court's majority-of-the-work test is relatively easy to apply and provides a measure of predictability. These are commendable attributes. However, the court's opinion implicitly crafts a new federal common law choice-of-law rule to decide what law will govern a contract that has some connection with structures on or attached to the seabed of the OCS or with the seabed itself. The Supreme Court has admonished that "Congress made clear provision for filling in the 'gaps' in federal law" that is to be applied under OCSLA, and that Congress "did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law."[60] We are to apply the adjacent state's law as federal law,[61] to the extent that it is not inconsistent with federal law.[62] I know of no

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[60] *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104-05, 92 S. Ct. 349, 30 L. Ed. 2d 296 (1971), overruled in part on other grounds by *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993).

[61] *Id.* at 103 ("The policies underlying the federal absorption of state law in the Lands Act make this result particularly obvious. As we pointed out in *Rodrigue*, Congress recognized that 'the Federal Code was never designed to be a complete body of law in and of itself' and thus that a comprehensive body of state law was needed."); *Id.* at 104 ("[T]he Court of Appeals' approach [applying the laches doctrine through admiralty law] amounts to an inappropriate creation of federal common law."); cf. *Id.* ("Congress specifically rejected national uniformity and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation.").

[62] *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 487, 101 S. Ct. 2870, 69 L. Ed. 2d 784 (1981).

"majority-of-the-work" test under federal law, even if federal common law that is inconsistent with Louisiana state law takes precedence under OCSLA.[63]

* * * *

For the foregoing reasons, I respectfully dissent.

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[63] *See Id.* ("But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only '[t]o the extent [it is] not inconsistent with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is 'inconsistent," [federal common law] controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby 'specifically rejected national uniformity' as a paramount goal.").

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED SEPTEMBER 22, 2008

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 07-31019

GRAND ISLE SHIPYARD INC;
GRAY INSURANCE COMPANY,

Plaintiffs-Appellees,

v.

SEACOR MARINE, LLC,

Defendant-Appellant.

Before GARZA and DENNIS, Circuit Judges, and MILLS,*

MILLS, District Judge:

* Chief Judge of the Northern District of Mississippi, sitting by designation.

Seacor Marine, LLC appeals the district court's grant of summary judgment to appellees Grand Isle Shipyard and Gray Insurance Company ("Gray") in the instant declaratory judgment action. We hold that the district court erred in concluding that the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.* ("OCSLA"), applies to an accident involving an offshore platform worker being transported by a vessel on the high seas. The district court therefore erred in applying the provisions of the Louisiana Oilfield Indemnity Act, LA. REV. STAT. ANN. § 9:2780(A) ("LOIA") as surrogate federal law under OCSLA to invalidate the indemnity agreement in this case. Concluding that general maritime law applies instead, we vacate the district court's order invalidating the indemnity agreement and remand for additional proceedings.

FACTS AND PROCEEDINGS BELOW

This declaratory judgment action involves an indemnity dispute between Grand Isle and Seacor, two contractors of BP American Production Company ("BP"). Grand Isle's contracting duties involved the repair and maintenance of BP's offshore platforms, while Seacor's duties involved the transporting of workers for BP and its contractors. The indemnity dispute in this case arises from an April 2005 incident in which Denny Neil, a Grand Isle employee, was injured in a fall onboard the M/V SEA HORSE IV, a vessel owned and operated by Seacor. At the time of the accident, the SEA HORSE IV was transporting Neil from his work platform to the residential platform which contained his living quarters. Deposition testimony indicated that the

vessel was in close proximity to the residential platform at the time of the accident, but it is undisputed that neither Neil nor the SEA HORSE IV were in physical contact with the platform when the accident occurred.

Neil filed suit against Seacor in the U.S. District Court for the Southern District of Texas, asserting a claim for vessel negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act ("LHWCA"). Seacor tendered its defense and indemnity to Grand Isle; Seacor also claimed the benefit of insurance provided by Grand Isle's insurer Gray. On March 17, 2006, Grand Isle and Gray filed suit in the U.S. District Court for the Eastern District of Louisiana, seeking a declaratory judgment that: (1) Grand Isle is not contractually obligated to defend and indemnify Seacor; and (2) Seacor is not entitled to insurance coverage from Gray.

Grand Isle and Gray subsequently filed motions for summary judgment in which they argued (1) that by virtue of OCSLA, the LOIA applies as surrogate federal law in this case, thus invalidating the contractual indemnity provision at issue here; and (2) that § 905(b) of the LHWCA is applicable to the case and prohibits enforcement of the indemnity provision. Seacor filed its own cross motion for summary judgment, maintaining that general maritime law governs the dispute and noting that nothing in that law prohibits the indemnity agreement at issue here. On September 26, 2007, the district court issued a summary judgment order in which it held that Louisiana law does apply in this

case and that the LOIA bars Seacor from asserting its indemnity and insurance claims against Grand Isle and Gray. The district court accordingly granted Grand Isle and Gray's motions for summary judgment, and Seacor timely appealed the ruling to this court.

ANALYSIS

This case presents an issue of law of some significance in our maritime jurisprudence. The primary legal issue on appeal involves whether Louisiana state law, in particular the LOIA, applies to void the indemnity obligations contained in the contract between BP and Grand Isle. BP included virtually identical indemnity provisions in its contracts with Grand Isle and Seacor, and neither party disputes that BP sought thereby to impose reciprocal indemnity obligations among its contractors.[1] The question in this case is, instead,

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[1] Seacor seeks indemnity from Grand Isle under paragraph 14.07 of Grand Isle's contract with BP, which provides that:

> Contractor agrees to defend, indemnify, release and hold company's other contractors harmless in accordance with the provisions of this Article 14 (to the extent such other Contractors execute cross indemnification provisions substantially similar to those contained in this section 14.07) from and against all claims, liabilities, damages, and expenses (including without limitation attorney's fees and other costs of defense), irrespective of insurance coverages for the following: 14.07.01(i) all injuries to, deaths, or illnesses of persons in contracted group CG: . . . whether or not occasioned by or the result in whole or in part of the negligence

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whether BP's clear indemnity provision is nevertheless invalidated by the equally clear provisions of the LOIA.

In enacting the LOIA, the Louisiana legislature explained that its intent was "to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee." LA. REV. STAT. ANN. § 9:2780(A). The Supreme Court of Louisiana has observed that the LOIA "arose out of a concern about the unequal bargaining power of oil companies and contractors and was an attempt to avoid adhesionary contracts under which contractors would have no choice but to agree to indemnify the oil company, lest they risk losing the contract." *Fontenot v. Chevron U.S.A., Inc.*, 676 So. 2d 557, 563 (La. 1996).

The parties agree that if the LOIA applies, then this law would serve to void the indemnity provision at issue in this case. It is well settled that for Louisiana law to apply as surrogate federal law under OCSLA, the three conditions established by this court in *Union Texas Petroleum Corp. v. PLT*

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or fault, whether sole, concurrent, joint, active, or passive, of company's other contractors or any other entity or person or the unseaworthiness of any vessel.

Engineering, Inc., 895 F.2d 1043 (5th Cir. 1990) must be met. These three conditions are that (1) the controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto); (2) federal maritime law must not apply of its own force; and (3) the state law must not be inconsistent with federal law.

We conclude that the OCSLA situs requirement is not met in this case, and it is accordingly unnecessary to consider whether the remaining two *PLT Engineering* conditions are met. Section 1333(a)(1) of OCSLA sets forth a statutory situs requirement, as follows:

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: Provided, however, that mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

In the 2002 decision of *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002), we comprehensively examined the scope of the § 1333(a)(1) situs requirement for the first time, observing that:

> [T]he OCSLA draws important distinctions between the two categories of artificial islands, installations, and other devices. Each category is defined by the purpose of the device-the former, extraction of resources; the latter, transportation of resources. The former also includes the phrase, "which may be erected [on the OCS]," while the latter does not. Conversely, the latter contains the phrase, "other than a ship or vessel," while the former does not.

Demette, 280 F.3d at 497.

In accordance with these observations, we held in *Demette* that:

> We incorporate these distinctions into the following rule:
>
> The OCSLA applies to all of the following locations:
>
> (1) the subsoil and seabed of the OCS;
>
> (2) any artificial island, installation, or other device if

> (a) it is permanently or temporarily attached to the seabed of the OCS, and
>
> (b) it has been erected on the seabed of the OCS, and
>
> (c) its presence on the OCS is to explore for, develop, or produce resources from the OCS;
>
> (3) any artificial island, installation, or other device if
>
> (a) it is permanently or temporarily attached to the seabed of the OCS, and
>
> (b) it is not a ship or vessel, and
>
> (c) its presence on the OCS is to transport resources from the OCS.

Id.

Based on *Demette,* it is apparent that the SEA HORSE IV does not qualify as an OCSLA situs within the meaning of § 1333(a)(1).[2] That is, the

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[2] One commentator has expressed his view that *Demette* gave overly broad treatment to § 1333(a)(1), arguing that the situs provision "cannot be read to delimit the coverage of the entire OCSLA." David W. Robertson, The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes, 38 J. Mar. L. & Com. 487, 502 (Oct. 2007). Regardless of whether this view has merit, *Demette* represents the law of this circuit, and our task here is simply to apply it.

vessel does not qualify as either "the subsoil and seabed of the [OCS]," an "artificial island," or an "installation . . . permanently or temporarily attached to the seabed." Indeed, as to the latter category, § 1333(a)(1) specifically excludes "a ship or vessel" used for "transport[ing] resources from the OCS" from being a potential OCSLA situs.

In holding that the situs requirement was met in this case, the district court did not apply our holding in *Demette,* instead relying upon older authority which we conclude, for reasons discussed below, to be factually distinguishable from this case.[3] The district court likewise did not apply the Supreme Court's analysis in *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986), which we deem to be controlling in this case. In *Tallentire,* two platform workers were killed in a crash on the high seas of a helicopter which had been transporting them from the offshore drilling platform where they worked to their home base in Louisiana. *Tallentire,* 477 U.S. at 209. The survivors of the workers argued that they were entitled to damages based on the Louisiana Wrongful Death Statute, which they asserted was applicable either by its own terms or as surrogate federal law under OCSLA. *Id.*

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[3] We acknowledge that the district court faced a difficult task in applying our OCSLA jurisprudence. Indeed, we have previously "expressed our frustration with the inconsistency of our case law" in this context. *Hodgen v. Forest Oil Corp.,* 87 F.3d 1512, 1523 n. 8 (5th Cir. 1996)(citations omitted).

The Supreme Court in *Tallentire* concluded that OCSLA did not apply in that case, writing that:

> admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity. *See Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). Although the decedents were killed while riding in a helicopter and not a more traditional maritime conveyance, that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an "island," albeit an artificial one, to the shore.

Id. at 218-19. Significantly, the Supreme Court in *Tallentire* rejected the notion that the status of the decedents as platform workers should render OCSLA applicable to what was otherwise a maritime accident:

> The character of the decedents as platform workers who have a special relationship with the shore community simply has no special relevance to the resolution of the question of the application of OCSLA to this case. . . . We do not interpret § 4 of OCSLA, 43 U.S.C. § 1333, to require or permit us to extend the coverage of the statute to the platform workers in this case

> who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed.

Id.

In concluding that OCSLA applies in this case, the district court relied upon our decision in *PLT Engineering*. The district court placed particular emphasis upon our observation that the situs requirement had been met in that case because "the 'locations where substantial work pursuant to the contract was done were covered situses.'" *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 2007 U.S. Dist. LEXIS 71674, 2007 WL 2874808 at *3 (E.D. La. 2007)(quoting *PLT Engineering*, 895 F.2d at 1047). Considered in its entirety, our holding in *PLT Engineering* does not support the result reached by the district court in this case. *PLT Engineering* was a breach of contract case in which we concluded that OCSLA applied to a dispute involving work on an undersea gathering line. *PLT Engineering*, 895 F.2d at 1049. We reached this conclusion in spite of the fact that the work at issue in *PLT Engineering* was performed by vessels and divers in the ocean, not on a platform. *Id.* In explaining our conclusion that OCSLA nevertheless applied, we wrote that:

> In the first place, the gathering line exactly fits the statutory definition of an "other

> device [ ] permanently or temporarily attached to the seabed ... erected thereon for the purpose of ... developing, or producing resources therefrom." 43 U.S.C. § 1333(a)(1). In addition, the gathering line was buried beneath the ocean floor. It was connected to a platform at one end. It was connected to a transmission line at the other. The locations where the substantial work was done were covered situses-the subsoil or seabed; an artificial island; and an installation for the production of resources. Thus the first condition is met.

Id. at 1047-48. We thus noted several factors in *PLT Engineering* which supported a conclusion that the OCSLA situs requirement was met in that case, and the district court placed excessive weight upon our observation that the "locations where the substantial work was done were covered situses."

It should be emphasized that *PLT Engineering* involved a contractual dispute, and our analysis in that context does not necessarily apply to a tort action arising on a vessel transporting workers on the high seas. Indeed, in *PLT Engineering,* we distinguished that case from *Tallentire* on the basis that the latter decision involved an "accident . . . on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity," namely "the ferrying of passengers from an 'island,' albeit an artificial one, to the shore." *Id.* at 1050 (quoting *Tallentire,* 477 U.S. at 218-19). The accident in this case involved a vessel transporting workers between two "islands"

rather than between an "island" and the shore, but it is nevertheless clear that the vessel here was engaged in the "ferrying of passengers," which is "an activity bearing a significant relationship to a traditional maritime activity." *Id.* This case thus falls squarely within the scope of *Tallentire,* as interpreted in *PLT Engineering.*[4] We note that there are other bases upon which this case can be distinguished factually from *Tallentire,* but none of these bases dictates a different result here. It is true, for example, that the SEA HORSE IV was much closer to an offshore platform at the time of the accident than the helicopter in *Tallentire,* which crashed miles from the nearest platform. Appellant asserts in its brief, and appellees do not dispute, that:

> Although the district court stated in its Reasons and Order that the vessel was a "few yards" from the platform when the injury occurred, there is technically nothing in the record to support this. The only evidence in the record on this point is

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[4] It seems clear that *Tallentire* provides the appropriate analysis for this case, but we recognize that there may be other cases where the lines of demarcation between *PLT Engineering* and *Tallentire* are less clear. While we view the fact that *PLT Engineering* was a breach of contract case to be of some significance in distinguishing it from *Tallentire,* our opinion today should not be read as suggesting that a simple tort/contract dichotomy applies in this context. It is apparent that the issues in this context are complex, and we leave the establishment of boundaries between *PLT Engineering* and *Tallentire* to future decisions.

> the declaration from the vessel's captain, Henry Cameron, who notes that the vessel was in the process of positioning "near" the platform when the accident happened. Appellant's Br. 7 n.2.

It is thus apparent that, unlike in *Tallentire,* the accident here occurred in close proximity to an offshore platform. However, there is no suggestion that Neil was in actual physical contact with the platform at the time of his accident. This is significant in light of our precedent indicating that an accident involving a plaintiff on a vessel who was nevertheless in physical contact with a platform may be deemed to have occurred on an OCSLA situs. In *Hollier v. Union Texas Petroleum Corp.,* 972 F.2d 662 (5th Cir. 1992), for example, a platform worker was killed while stepping from a stationary crew boat to an offshore platform. *Hollier,* 972 F.2d at 664-65. In concluding that the OCSLA situs requirement was met, we noted that, while a crew boat "is generally considered to be a vessel, not an artificial island" because "the [employee] was in physical contact with the platform at the time of his injury," the situs requirement was met in that case. *Id.*

We reached a similar result in *Hodgen v. Forest Oil Corp.,* 87 F.3d 1512, 1527 (5th Cir. 1996), which involved a plaintiff on a vessel who was, at the time of his accident, in physical contact with a rope connected to an offshore platform. In contrast to *Hollier* and *Hodgen,* the evidence in this case is clear that Neil was not in physical contact with an offshore platform at the time of his accident, and we

therefore deem it irrelevant whether the vessel on which he was traveling was a few meters or a few miles from the platform. In neither case would the SEA HORSE IV qualify as "the subsoil and seabed of the [OCS]," an "artificial island" or an "installation . . . permanently or temporarily attached to the seabed" within the meaning of § 1333(a)(1).

The district court acknowledged *Hodgen* in its order, writing that:

> Seacor argues that the dispositive issue is whether the vessel was in physical contact with the platform or seabed at the time of the accident. In making this argument, Seacor is asking the Court to apply a bright line rule that if there is no physical connection with an OCSLA situs, state law does not apply. However, the Fifth Circuit "does not apply any physical contact rule with the rigidity that [Defendant] would impose." *Hodgen,* 87 F.3d at 1527 (discussing *Hollier v. Union Texas Petroleum Corp.,* 972 F.2d 662 (5th Cir. 1992)).

Grand Isle, 2007 U.S. Dist. LEXIS 71674, 2007 WL 2874808 at *3. A closer review makes it clear that *Hodgen* does not support the result reached by the district court in this case. In making the aforementioned observation in *Hodgen,* we were responding to a rather hyper-technical argument that the offshore worker in that case had actually suffered his injuries after he had let go of the rope connecting him to the platform, thus negating any

finding of physical contact. *Hodgen,* 87 F.3d at 1527. In responding to this argument, we wrote that:

> Even if the evidence were pellucid that Hodgen's injuries were caused by the spill onto all fours, and that Hodgen released the rope at this precise moment, we would still find OCSLA situs present. In *Hollier,* the injured worker "was crushed, then drowned." 972 F.2d at 664. Unless we are to believe that the *Hollier* plaintiff sank immediately to the seabed or drowned while at all times remaining in contact with the platform, we must presume that the drowning did not occur while the worker was in physical contact with an OCSLA situs. Thus, the *Hollier* court's holding would compel the conclusion that this circuit does not apply any physical contact rule with the rigidity that appellants would impose.

Id. It should be apparent from this quote that we were merely stressing in *Hodgen* that we would not carry any physical contact requirement to extreme or absurd lengths, noting that we had not done so in *Hollier.* However, the fact remains that, in this case, there is no argument whatsoever that Neil was in contact with the platform at the time of his injury, as there was in *Hodgen* and *Hollier.* This case is thus clearly distinguishable from those decisions, and the district court erred in interpreting them as supporting OCSLA's applicability in this case.

We note that the issue here was recently addressed by U.S. District Judge Jay C. Zainey in a September 2007 summary judgment ruling in *Fuselier v. Sea Boat Rentals, Inc.*, 2007 U.S. Dist. LEXIS 68318, 2007 WL 2713278 (E.D. La. 2007). *Fuselier* involved a lawsuit filed by a platform worker who tripped over baggage on the M/V SEA BREEZE, a vessel which was transporting him to his work offshore. In rejecting an argument that the LOIA should apply as surrogate federal law under OCSLA, Judge Zainey interpreted *Tallentire* and *Demette* as supporting a conclusion that:

> the threshold determination that must be made when determining whether state law governs a controversy arising on the OCS is whether the OCSLA applies. And the OCSLA only applies if the controversy arises on an OCSLA situs. The "controversy" in this case is Fuselier's claim for injuries that he sustained aboard the SEA BREEZE. Fuselier was injured on the high seas while en route to an OCSLA situs. It is undisputed that Fuselier did not sustain his injuries on an OCSLA situs. . . . Although no decision, non-binding or otherwise, provides the Court an analytical roadmap for the appropriate analysis to be used in this case, the decisions that bind this Court unequivocally hold that the OCSLA does not reach controversies that do not arise on an OCSLA situs.

Fuselier, 2007 U.S. Dist. LEXIS 68318, 2007 WL 2713278 at *4, citing *Tallentire* and *Demette.* Judge

Zainey accordingly concluded that the OCSLA situs requirements was not met in that case and that it was therefore unnecessary to proceed past the first factor in the *PLT Engineering* test.

In this case, it is likewise apparent that the SEA HORSE IV does not qualify as an OCSLA situs under § 1333(a)(1), as interpreted in *Demette*. The first part of the *PLT Engineering* test is therefore not met, and the district court erred in concluding that OCSLA applied in this case. By extension, the district court likewise erred in concluding that the LOIA applied as surrogate federal law to bar Seacor's indemnity claims against Grand Isle. We therefore VACATE the district court's order invalidating the indemnity agreement in this case and granting summary judgment in favor of Grand Isle and Gray.

The district court indicated in its summary judgment order that appellees had raised an additional argument before it, namely that "Section 905(b) of *the LHWCA* is applicable to the case and prohibits enforcement of the indemnity provision." *Grand Isle,* 2007 U.S. Dist. LEXIS 71674, 2007 WL 2874808 at *1. The district court did not address this argument in its order, and counsel for appellees emphasized during oral argument that this argument would remain outstanding regardless of our resolution of the OCSLA issues on appeal. Without expressing any opinion regarding the merits of this argument, we conclude that this case should be REMANDED so that the district court may

address it and any other outstanding issues in this declaratory judgment action.[5]

VACATED AND REMANDED.

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[5] It appears that there are, at least potentially, other issues in this case which are not resolved by our opinion today. For example, appellees asserted in their declaratory judgment petition that "Gray's insurance policies issued to [Grand Isle] do not provide Seacor coverage for Denny Neil's claims," and nothing in our opinion today addresses the scope of insurance coverage provided by Gray.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, FILED OCTOBER 25, 2007

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

Number: 06-1405

SECTION: "N" (3)

GRAND ISLE SHIPYARD, INC. AND THE GRAY INSURANCE COMPANY

v.

SEACOR MARINE, LLC

JUDGMENT ON MOTIONS FOR SUMMARY JUDGMENT

JUDGE KURT D. ENGELHARDT

MAG. JUDGE KNOWLES

After considering the cross motions for summary judgment by plaintiffs, Grand Isle Shipyard, Inc. and The Gray Insurance Company, and defendant, Seacor Marine, LLC, and for reasons assigned on September 26, 2007, judgment is hereby rendered in favor of Grand Isle Shipyard, Inc. and The Gray Insurance Company and against Seacor Marine, LLC, granting plaintiffs' motion, denying defendant's motion, and declaring that Plaintiffs have no duty to defend, indemnify or insure Seacor Marine, LLC against the claims for injuries allegedly sustained by Denny Neil on or about April 28, 2005. Plaintiffs are also awarded their costs of Court from defendant.

New Orleans, Louisiana, this 25th day of October, 2007.

s/
KURT D. ENGELHARDT
United States District Judge

APPENDIX D — ORDER AND REASONS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION

NO. 06-1405

SECTION "N" (3)

GRAND ISLE SHIPYARD, INC. AND THE GRAY INSURANCE COMPANY

v.

SEACOR MARINE, LLC

ORDER AND REASONS

Presently before the Court are cross motions for summary judgment filed by Plaintiffs, Grand Isle Shipyard, Inc. ("Grand Isle") and Gray Insurance Company ("Gray") and Defendant, Seacor Marine LLC ("Seacor"). (Rec. Doc. Nos. 8 and 10.) For the reasons stated herein, Grand Isle's and Gray's Motion for Summary Judgment is **GRANTED** and Seacor's Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

On or about April 27, 2005, Denny Neil ("Neil") allegedly sustained injuries from falling about the M/V SEA HORSE IV as he exited the galley and attempted to board Platform 47AQ, owned and operated by Seacor. Neil was employed by Grand Isle. BP American Production Company ("BP") contracted with Grand Isle to provide repair and maintenance on fixed platforms on the outer continental shelf pursuant to a Master Maintenance and Construction Services Contract ("MMCSC").[1]

The M/V SEA HORSE IV was an offshore vessel owned and operated by Seacor and provided by Seacor pursuant to a Vessel Charter Contract with BP. At the time of the alleged injury, Neil, who had finished work for the day, was traveling as a passenger aboard the M/V SEA HORSE IV to Platform 47AQ, owned and operated by Seacor,

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[1] The MMCSC contains a choice of law provision designating the general maritime law as the governing law when the performance of the contract is "in any way" related to maritime activity.

where he and the other Grand Isle workers lived. Neil alleged that he slipped and fell while exiting the galley of the SEA HORSE and attempting to board the platform, sustaining serious injuries.

Neil filed suit against Seacor in the United States District Court for the Southern District of Texas, asserting a claim for vessel negligence under Section 905(b) of the Longshore and Harbor Worker's Compensation Act ("LHWCA"). Seacor subsequently settled the claim with Neil. Upon the filing of suit by Neil and thereafter, Seacor tendered its defense and indemnity to Grand Isle; in addition, Seacor claimed the benefit of first party liability insurance allegedly owed by Grand Isle pursuant to the terms of the Master Maintenance and Construction Services Contract.[2] Grand Isle denied Seacor's demand.

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[2] Seacor seeks indemnity from Grand Isle under paragraph 14.07 of the MMCSC, which reads:

> Contractor agrees to defend, indemnify, release and hold company's other contractors harmless in accordance with the provisions of this Article 14 (to the extent such other Contractors execute cross indemnification provisions substantially similar to those contained in this section 14.07) from and against all claims, liabilities, damages, and expenses (including without limitation attorney's fees and other costs of defense), irrespective of insurance coverages for the following:
>
> 14.07.01(i) all injuries to, deaths, or illnesses of persons in contracted group CG:
>
> ...whether or not occasioned by or the result in whole or in part of the negligence or fault, whether

Continued

On March 17, 2006, Grand Isle and Gray filed suit in this Court, seeking a declaratory judgment that: (1) Grand Isle is not contractually obligated to defend and indemnify Seacor; and (2) Seacor is not entitled to first party insurance coverage from Gray. On December 29, 2006, Grand Isle moved for summary judgment. Grand Isle does not dispute that the agreement contains an indemnity provision. Rather, Grand Isle argues that the indemnity and insurance provisions are null and void. In support of this contention, Grand Isle makes two arguments: (1) by virtue of the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*, Louisiana law applies to the case; thus, the indemnity provision is null and void pursuant to the Louisiana Oilfield Indemnity Act ("LOIA"), La. R.S. 9:2780; (2) Section 905(b) of the LHWCA is applicable to the case and prohibits enforcement of the indemnity provision. On the same day, Seacor filed a cross motion for summary judgment, claiming the general maritime law governs the dispute, entitling Seacor to indemnification from Grand Isle. Both parties agree that the determinative inquiry in this contractual and coverage dispute is whether Louisiana law applies, and that resolution of this issue will resolve the cross motions for summary judgment.

II. LAW AND ANALYSIS

> sole, concurrent, joint, active, or passive, of company's other contractors or any other entity or person or the unseaworthiness of any vessel...

(MMCSC, Rec. Doc. No. 8-5, p. 10.)

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See* Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The materiality of facts is determined by the substantive law's identification of which facts are critical and which facts are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it "might affect the outcome of the suit under the governing law." *Id.*

Initially, the movant bears the burden of demonstrating the absence of material fact issues. *Abbott v. Equity Group, Inc.*, 2 F.3d 613, 619 (5th Cir. 1993). The movant is not required, however, to negate the elements of the nonmovant's case. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*citing Celotex*, 477 U.S. at 323). If the dispositive issue is one for which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its summary judgment burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *Celotex*, 477 U.S. at 325. If the movant meets his burden, then the burden then shifts to the nonmovant, who, to avoid summary judgment, must go beyond the pleadings and designate specific facts

that show that there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (*citing Celotex*, 477 U.S. at 325). Of course, unsubstantiated assertions do not constitute competent summary judgment evidence. *Abbott*, 2 F.3d at 619 (*citing Celotex*, 477 U.S. at 324).

Before granting a motion for summary judgment, the district court must be satisfied that no reasonable trier of fact could find in favor of the nonmoving party. *Anderson*, 477 U.S. at 249; *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (stating that "the facts and inferences [must] point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict"). In determining whether a material issue of fact exists, the evidence and all inferences drawn therefrom must be considered in the light most favorable to the nonmoving party. *Baker v. American Airlines, Inc.*, 430 F.3d 750, 753 (5th Cir. 2005) (*quoting Machinchick v. PB Power, Inc.*, 398 F.3d 345, 350 (5th Cir. 2005)).

B. Analysis

Nature of the Contract

The parties disagree on whether the Court should apply Louisiana or general maritime law to interpret the MMCSC between BP and Grand Isle. Grand Isle contends that by virtue of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331, *et seq.*, the law of the adjacent state (Louisiana) applies to this controversy and that Louisiana law, specifically the Louisiana Oilfield

Indemnity Act ("LOIA"), La. R.S. 9:2780, renders invalid the indemnity provisions contained in the MMCSC. The parties agree that if Louisiana law applies, the indemnity provision between Grand Isle and BP cannot survive the dictates of the LOIA. The key inquiry, thus, is whether the general maritime law or OCSLA applies to this dispute. In order to determine which law applies, the Court must first determine the nature of the contract in question.

In order to determine whether OCSLA applies to a contract and whether the contract is maritime or non-maritime, the Fifth Circuit focuses on three significant factors: (1) whether the controversy arises on a situs covered by OCSLA (*i.e.* the subsoil, seabed, or artificial structures permanently or temporarily attached thereto); (2) whether federal maritime law applies of its own force and (3) whether the state law is inconsistent with federal law. *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990). This test is known as the *PLT* test, and it is firmly supported in Fifth Circuit jurisprudence as the proper test for deciding whether state law provides the rule of decision in an OCSLA case. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1526 (5th Cir. 1996).

1. Situs

Seacor argues that the dispositive issue is whether the vessel was in physical contact with the platform or seabed at the time of the accident. In making this argument, Seacor is asking the Court to apply a bright line rule that if there is no physical

connection with an OCSLA situs, state law does not apply. However, the Fifth Circuit "does not apply any physical contact rule with the rigidity that [Defendant] would impose." *Hodgen*, 87 F.3d at 1527 (discussing *Hollier v. Union Texas Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992)).

In this case, it is undisputed that the accident occurred when Neil was aboard the vessel in navigable waters, above the outer continental shelf. At the time of the accident, the vessel was within a few yards of the platform but was not attached to the platform or to any other structure.[3] At the time of the accident, Neil's work for the day was complete, and he was proceeding to the living quarters platform. Neil's work, which consisted mainly of platform repairs and grating repairs, was performed on platforms, not vessels. Neil's sole relationship to the vessel was as a passenger; he did not contribute to the mission of the vessel in any manner. Further, the work tickets from April 7, 2005 to May 7, 2005 demonstrate that the work performed pursuant to the MMCSC was performed on platforms, not on vessels.

In light of the above facts, the Court finds that although the accident did not occur on an OCSLA situs, under *PLT*, the situs requirement has been met in this case because "the locations where substantial work pursuant to the contract was done were covered situses...." *Wagner v. McDermott, Inc.*,

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[3] Despite conflicting statements regarding this issue in the memoranda, the parties later expressed their agreement that the vessel was not moored to the platform.

899 F.Supp. 1551, 1556 (W.D. La. Dec. 19, 1994) (*quoting PLT*, 895 F.2d at 1047), *aff'd.*, 79 F.3d 20 (5th Cir. 1996), *cert. denied*, 519 U.S. 945 (1997); *see also Hodgen*, 87 F.3d at 1524; *see also Dennis v. Bud's Boat Rental, Inc.*, 987 F.Supp. 948, 950 (E.D. La. Nov. 18, 1997) ("[T]here is a trend to find OCSLA situs where 'the work required by the contract was performed on an offshore platform' even if situs is not strictly, physically met." (*quoting* Wagner, 899 F.Supp. at 1556)).

2. Whether Federal Maritime Law Applies of its Own Force

The Fifth Circuit has held that "deciding whether a contract is maritime and whether maritime law applies of its own force" are identical inquiries for purposes of determining OCSLA applicability in the context of oilfield indemnity disputes, and "both belong as a single factor in the three part *PLT* test." *Hodgen*, 87 F.3d at 1524-25. In order to determine whether a contract is maritime or not, the Court applies the six-factor test set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990):

(1) What does the specific work order in effect at the time of the injury provide?
(2) What work did the crew assigned under the work order actually do?
(3) Was the crew assigned to do work aboard a vessel in navigable waters?
(4) To what extent did the work being done relate to the mission of the vessel?

(5) What was the principal work of the injured worker?
(6) What work was the injured worker actually doing at the time of his injury?

Id. at 316.

If a contract consists of multiple parts, such as a master service agreement followed by subsequent work orders, the parts must be interpreted together in evaluating whether maritime law applies to the interpretation and enforceability of the contract's provisions. *Id.* at 315. "Determination of the nature of the contract depends in part on the historical treatment in the jurisprudence and in part on a fact-specific inquiry." *Id.* at 316.

Applying the *Davis* factors to the case at bar, the Court concludes that the principal obligation of the BP-Grand Isle contract was non-maritime. The first and second *Davis* factors examine what the specific work order in effect at the time of the injury provides and what work the crew assigned under the work order actually performed. The MMCSC between Grand Isle and BP provided for maintenance and construction services. The description of work performed in the various work tickets relates to performing maintenance and repair work on fixed platforms.[4] While the April 25,

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[4] For example, the work ticket dated April 7, 2005 lists for its "description of work" "Cleaned up platform, put up spool's [sic] for life raft's [sic]. (Rec. Doc. No. 8-9, p. 1.) The work ticket dated April 8, 2005 recites: "Put in bracing for gas lift header...

Continued

2005 work ticket mentions a "boat," it makes no mention of performing work on the boat; the work ticket merely states that the workers "back loaded the boat" after completing the grating work on the platform and cleaning up the work area. (Rec. Doc. No. 8-12, p. 4.) To the extent that the workers loaded equipment onto the boat, that job could arguably be considered maritime; however, the Court finds that under these circumstances, such a task is, at most, merely incidental to the primary job

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stage equipment." *Id.* at p. 2. The work ticket dated April 9, 2005 recites: "Install meter run on gas lift and scrap old piping." *Id.* at p. 3. The work ticket dated April 10, 2005 recites: "Weld plates for hatch covers, modify support brace for gas lift header." *Id.* at p. 4. The April 11, 2005 work ticket recites: "Rigged up to surg tank and pulled to top deck, cleaned up old pipe and threw away." *Id.* at p. 5. The April 12, 2005 work ticket provides: "Cut angle iron for pollution ring on top deck." *Id.* at p. 6. The April 13, 2005 work ticket states: "Weld on hatch cover for well bay, weld on containment ring." *Id.* at p. 7. The April 21, 2005 work ticket recites: "Crew change, BP safety meeting, ISEA, Demo 4" jet wash line, working on taking down air intake boxes under white compressor, clean up work area." (Rec. Doc. No. 8-11, p. 3.) The April 23, 2005 work ticket provides: "06:00 BP safety meeting, ISEA, work on fabbing stand for M-2 and M-3, clean up work area." *Id.* at p. 6. Similarly, the April 24, 2005 work ticket recites: "06:00 BP safety meeting, ISEA, welding on stands for M-2 & M-3." (Rec. Doc. No. 8-12, p. 3.) The work ticket dated April 26, 2005 recites: "06:00 BP safety meeting, ISEA, laying grating over old plate on deck, clean up work area." (Rec. Doc. No. 8-13, p. 1.) On April 27, 2005, the date of the alleged injuries, the work ticket contains the following description of work done: "06:00 safety meeting, ISEA, laying grating and welding down, welding down pollution barrier, clean up work area." *Id.* at p. 3.

of performing maintenance and repair work on the fixed platforms. While the work tickets do make several references to safety meetings, there is no evidence that any of these safety meetings concerned vessel safety. The work tickets attached to Grand Isle's memorandum and described, in part, herein, sufficiently demonstrate that the work actually completed by the Grand Isle crew under the work orders were not maritime in nature. Further, the Grand Isle crew conducted actual work on the platforms and performed little to no work on the vessel itself. The vessel, rather, was used as a mode of transporting the employees to and from the platforms and the living quarters. In light of these facts, the Court finds that the first and second *Davis* factors weigh in favor of Grand Isle.

The third *Davis* factor, which examines whether the crew was assigned to do work aboard a vessel in navigable waters, also weighs in favor of Grand Isle. As mentioned above, the Grand Isle crew regularly traveled to and from the platform and the living quarters in Seacor vessels; however, no contract specifically assigned the Grand Isle crew to a vessel.

The fourth *Davis* factor, the extent to which the work being done related to the mission of the vessel, also weighs in favor of Grand Isle. There has been no evidence presented that the mission of the M/V SEA HORSE IV was anything other than to provide transportation to and from platforms. The evidence presented by both Plaintiffs and Defendant demonstrates that the only need for a vessel was to

transport Grand Isle's employees to and from platforms.

The fifth *Davis* factor, which relates to the principal work of the injured worker, also weighs in favor of Grand Isle. In this case, the evidence examined above, including the work tickets and MMCSC, demonstrates that the principal work of the Grand Isle crew in general, and Denny Neil in particular, involved maintenance and repair work on Seacor platforms. Seacor has put forth no evidence indicating that Neil engaged in any kind of work other than maintenance, repair, and construction work on fixed platforms; in contrast, Grand Isle sets forth deposition testimony demonstrating that the Grand Isle crew was engaged only in work on platforms.[5]

The sixth *Davis* factor examines the activities of the injured worker at the time of his injury. At the time of the accident, Neil was finished with his work for the day and was traveling on the vessel as a mere passenger on his way from the work site to the living quarters.[6] When Neil slipped and twisted

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[5] Q. While working for GIS, did you ever do any work on boats?

A. Work on boats, no.

(Neil Deposition, Rec. Doc. No. 8-4, p. 2.)

[6] Q. You were just a passenger on this Seacor boat, right?

A. That's correct.

Q. You weren't doing any rigging on the boat, right?

Continued

his ankle, he was exiting the galley of the vessel in an attempt to disembark the vessel. As such, the Court finds that Neil was not engaged in any conduct that would weigh in favor of applying maritime law to the contract at issue in this case.

Accordingly, the Court finds that the contract at issue in this case, the Master Maintenance and Construction Services Contract between BP and Grand Isle, is non-maritime.

3. Consistency of State and Federal Law

The third factor of the *PLT* test is whether the provisions of state law are inconsistent with any provision of federal law. Pursuant to OCSLA, the law of the adjacent state, Louisiana, supplies the rule of decision. The Fifth Circuit has specifically held that "nothing in the LOIA is inconsistent with federal law." *Hodgen*, 87 F.3d at 1529.

Because the Court finds that Louisiana law applies in this case pursuant to OCSLA, the indemnity provision in the BP-Grand Isle contract is null and void pursuant to the LOIA, and Seacor's claim to additional assured endorsements from Grand Isle is likewise without merit. *See Hodgen*, 87 F.3d at 1529 (*citing* La. R.S. § 9:2780.B., G.)

A. That's right.

(Neil Deposition, Rec. Doc. No. 8-4, pp. 5-6).

III. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that Grand Isle's Motion for Summary

Judgment is hereby **GRANTED**; **IT IS FURTHER ORDERED** that Seacor's Cross-Motion for Summary Judgment is hereby **DENIED**.

New Orleans, Louisiana, this *26th* day of *September*, 2007.

s/
KURT D. ENGELHARDT
United States District Judge

DECLARATION OF HENRY H. CAMERON

1. This declaration is given by Henry H. Cameron and is based upon my personal knowledge.

2. At the time of the alleged injury to Denny Neil on the SEA HORSE IV on or about April 27, 2005, I was an employee of Seacor Marioe, LLC and was the captain of the vessel.

3. At the time of Mr. Neil's alleged injury, the SEA HORSE IV was operating in navigable waters of the Gulf of Mexico in Grand Isle Block 47. This location is approximately II to 12 miles from the Louisiana coast and 15 miles from the nearest port, Port Fourchon, Louisiana.

4. At the time of Mr. Neil's alleged accident, the SEA HORSE IV was in the process of positioning near the British Petroleum fixed offshore platform located in Grand Isle Block 47 in order to transfer crew.

5. At the time of Mr. Neil's alleged accident, the SEA HORSE IV was not in contact with any part of the British Petroleum fixed offshore platform.

I declare under penalty of perjury of the United States of America that the foregoing is true and correct.

December 12/14, 2006.

s/
HENRY H. CAMERON